CHARLES ELMORE CR
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 524

MARK BARRETT COSBY,
Petitioner

v.

DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,
Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Seventh Circuit.

and

BRIEF IN SUPPORT THEREOF

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INDEX

	Page
Petition for writ of certiorari	1
Opinion of the court below	2
Summary statement of the matter involved	2
Jurisdiction of this Court	7
Questions presented	7
Reasons relied on for the allowance of the writ	8
Prayer	9
Brief in support of petition for certiorari	10
Opinion of the court below	10
Statement of the case	10
Specifications of error to be urged	10
Summary of the argument	11
Argument	
I. The proper remedy is by this suit in equity in the Federal Courts, and the Circuit Court of Appeals erred in holding that Cosby Jr. is limited to relief in the Logan County Court	12
II. At the time of the confirmation decree in the Logan County Court Cosby Jr. had a two-thirds interest in fee simple in the Skelton farm and the right to redeem the land from the sale, and could not lawfully be deprived of said property without an opportunity for judicial hearing prior to confirmation	15
III. Cosby Jr. was not, either himself or through his predecessor in title, given an opportunity by the Logan County Court to litigate or protect his title, and the decree of confirmation effecting a conveyance of the title was a deprivation of his property without due process of law contrary to the 14th Amendment; the decisions of the District Court and the Court of Appeals, by giving conclusive effect to this prior decree of the Logan County Court, were a violation of the 5th Amendment	17

IV. Cosby Jr. cannot constitutionally be bound by the decrees of the Logan County Court because there was no effective privity between him and Cosby Sr. at the time those decrees were entered..... 24

V. The confirmation decree can not constitutionally be held to bind the interests of Cosby Jr. because Johnston knowingly failed in his fiduciary duty to join Cosby Jr. as a party and, while purporting to represent him as trustee in Johnston's own petition, suffered the decree to be entered in derogation of Cosby Jr.'s rights without any contest in his behalf. 29

VI. Even if the decrees of the Logan County Court were, in any respect, valid against the interest of Cosby Jr., he is entitled to equitable relief from those decrees against Harts who bought at the sale with full notice and knowledge of the defects in the sale proceeding..... 33

Authorities Cited

Alward v. Borah, 381 Ill. 134, 44 N. E. (2d) 865 (1942) 15, 16

Anderson v. Shepard, 285 Ill. 544, 121 N. E. 215 (1918) 16

Armstrong v. Obucino, 300 Ill. 140, 133 N. E. 58 (1921) 23

Arrowsmith v. Gleason, 129 U. S. 86, 32 L. Ed. 630 (1889) 13, 14, 15

Baker v. Baker, 284 Ill. 537, 120 N. E. 525 (1918).... 21, 28

Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407 (1879) 13

Blacker v. Thatcher, 145 F. (2d) 255 (C. C. A. 9th 1944) 15

Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306 (1911) 16

Botsford v. O'Conner, 57 Ill. 72 (1870).....15, 17, 24

Brown v. Fletcher's Estate, 210 U. S. 82, 52 L. Ed. 966 (1908) 19, 20, 21, 23

Burket v. Reliance Bank & Trust Co., 367 Ill. 196, 11 N. E. (2d) 6 (1937) 18

Burr v. Bloemer, 174 Ill. 638, 51 N. E. 821 (1898).. 16

Chicago, R. I. & P. Ry. Co. v. Callicotte, 267 F. 799 (C. C. A. 8th 1920) 14

Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834 (1889).... 12

Denk v. Fiel, 249 Ill. 424, 94 N. E. 672 (1911)..... 34

Diamond v. Connolly, 251 Fed. 234 (C. C. A. 9th, 1918) 29

Diamond v. Connolly, 276 Fed. 87 (C. C. A. 9th, 1921) 29

Eddy v. Eddy, 302 Ill. 446, 134 N. E. 801 (1922).... 29

Elliott v. Frakes, 71 Ind. 412 (1880), *reaffirmed on 2nd appeal;* 90 Ind. 389 (1883)..... 28

Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, 66 L. Ed. 658 (1921) 13, 14

Evans v. Ill. Surety Co., 319 Ill. 105, 149 N. E. 802 (1925) 22

Fisher v. Banta, 66 N. Y. 468 (1876)..... 30

Gibson v. Roll, 27 Ill. 88 (1862)..... 15

Graver v. Faurot, 76 Fed. 257 (C. C. A. 7th, 1896).. 14

Green V. Watkins, 6 Wheat. 260, 5 L. Ed. 256 (U. S. 1821) 25

Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22 (1940) 17, 25, 28

Hansen v. Swartz, 345 Ill. 609, 178 N. E. 246 (1931) 28

Harris v. Chi. Title & Trust Co., 338 Ill. 245, 170 N. E. 285 (1930).....19, 21, 23

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Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737 (1904) 15, 30

Hewitt v. Hewitt, 17 F. (2d) 716 (C. C. A. 9th, 1927) 14, 29

Hoffman v. Hanley, 187 Ill. App. 551 (2d Dist. 1914) 20, 23, 28

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Hopkins v. Patton, 257 Ill. 346, 100 N. E. 992 (1913) 27

Hultberg v. Anderson, 252 Ill. 607, 97 N. E. 216 (1912) 18

Hunt v. Acre, 28 Ala. 580 (1856)..... 25

Indiana Harbor Belt RR. Co. v. Calumet, 391 Ill. 280, 63 N. E. (2d) 369 (1945)..... 25

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547 (1884) 13

Johnston v. Cosby, 374 Ill. 407, 29 N. E. (2d) 608 (1940) 17, 27, 33

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LeMoyne v. Harding, 132 Ill. 23, 23 N. E. 414 (1890) 16

Londoner v. Denver, 210 U. S. 373, 52 L. Ed. 1103 (1908) 16, 18

Loyd v. Malone, 23 Ill. 41 (1859)..... 34

Manternach v. Studt, 230 Ill. 356, 82 N. E. 829 (1907) 30

Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870 (1891) 13, 14

McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015 (1885) 30

McDaniel v. Traylor, 196 U. S. 415, 49 L. Ed. 533 (1905) 14

McReynolds v. Miller, 372 Ill. 151, 22 N. E. (2d) 951 (1939) 34

National Surety Co. v. State Bank of Humboldt, 120 Fed. 593 (C. C. A. 8th, 1903)..... 14

Nelson v. Meehan, 155 Fed. 1 (C. C. A. 9th, 1907).. 14

Newberry Library v. Bd. of Education, 387 Ill. 85, 55 N. E. (2d) 147 (1944)..... 17

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Peo. *ex rel,* Jones v. Chicago Lloyds, 391 Ill. 492, 63 N.E. (2d) 479 (1945)..... 22

Peo. v. Russell, 283 Ill. 520, 119 N. E. 617 (1918).... 26

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Requa v. Holmes, 16 N. Y. 193 (1857), reaffirmed 26 N. Y. 338 (1863) 25

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Sargeant v. Rowsey, 89 Mo. 617, 1 S. W. 823 (1886).. 25

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Swope v. Swope, 173 Ala. 157, 55 So. 418 (1911).... 30

U. S. v. Mashunkashey, 72 F. (2d) 847 (C. C. A. 10th, 1934) 14

U. S. v. Walker, 109 U. S. 258, 27 L. Ed. 927 (1883).. 22

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Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62 (1921) 28

Welch v. Louis, 31 Ill. 446 (1863)..... 20, 22

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Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914 (1876) 18

Wright v. Simpson, 200 Ill. 56, 65 N. E. 628 (1902) 29

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Statutes

Ill. Rev. Stat. (1937), c. 3, para. 100, 103, 110....15, 16, 29

Texts

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Restatement, Judgments (1942), c. 2, §6; c. 4, §91, pp. 450, 451, 454; c. 5, § 112, pp. 532, 536-7 and § 118, p. 570 .....14, 17, 19, 31, 32

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No._____

MARK BARRETT COSBY,

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DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NOW COMES Mark Barrett Cosby and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals rendered and entered on the 23rd day of July, 1948, in this case, lately pending in that Court

and styled Mark Barrett Cosby and Adele Vance Milem, Plaintiffs-Appellants, v. David H. Harts, Florence J. Harts and Percy B. Johnston, Defendants-Appellees, being cause No. 9258 of civil causes on the docket of that Court, affirming a judgment of the United States District Court for the Southern District of Illinois, Southern Division, rendered in said cause in favor of respondents and against your petitioner.

Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which petitioner here seeks to have reviewed, appears on pp. 431 to 438, inclusive, of the printed transcript of the record filed herewith and is reported in 169 F. (2d) at page 689.

Summary Statement of the Matter Involved

The plaintiff, your petitioner, Mark Barrett Cosby, Jr. and his mother, Adele Vance Milem, brought this action as an original suit in equity to recover certain farm land from the defendant and respondent, David H. Harts, who holds said land under an executor's deed made in consequence of a sale in a prior proceeding to sell real estate to pay debts in the estate of May Barrett Chappelear, held in the County Court of Logan County, Illinois; the suit asks that Harts and his wife be directed to convey and deliver possession of said farm to the plaintiffs and also that said defendants be ordered to account for rents and profits realized from said farm, but plaintiffs declared themselves ready and willing to pay defendants, as a condition to the conveyance, such amount as the court should decree to be justly due and owing to defendants and to do equity in the premises.

Your petitioner, Cosby, Jr., is the son, and his co-plaintiff, Adele Vance Milem, is the widow of Mark Barrett Cosby, Sr., who was the only son of May Barrett Chappelear. Cosby, Jr., was a minor, under 16 years of age at the time of the sale proceedings. The defendant, David H. Harts, is, and for many years has been the husband of the defendant, Florence Johnston Harts, sister of the defendant, Percy B. Johnston, who was named both executor and trustee by Mrs. Chappelear's will.

The farm involved is known as the Skelton farm and is comprised of 425 acres located in Logan County, Illinois. The land was part of the estate of May Barrett Chappelear

who died testate in 1937, leaving all her real estate in trust to Johnston, with directions to pay the net income for life to Cosby, Sr. and, after his death, to the lawful heirs of his body living at the time of his death, and upon the death of the last survivor of such heirs or in the event there were no lawful heirs of his body, the trust was to terminate and the corpus to be distributed to the heirs of certain other relatives (R. 16, 17).

The will was admitted to probate in the County Court of Logan County on January 25, 1938 (R. 300), and letters were issued to Johnston as executor. On May 19, 1938 Johnston filed petition in the Logan County Court to sell the Skelton farm to pay debts (R. 255-8). At all times during the pendency of the sale proceeding, the trust under the Chappelear will was considered valid and Cosby, Jr. was conceded to have a life estate therein subject to the prior life estate of his father, Cosby, Sr. (alleged in para. 4 and 11 Amended Complaint, R. 4, 6; admitted by all defendants para. 4, 11 of Answer, R. 26, 28, 36, 38).

But Johnston named, as parties defendant to the petition for sale, only Cosby, Sr., The Hancock Insurance Company, which held a mortgage on the farm, two tenants in possession and two specific legatees of personalty under the will. Neither Cosby, Jr., the devisees of the remainder in fee following the trust, nor Johnston, as trustee, were joined as defendants (R. 255).

In his sworn petition (R. 256-258) Johnston alleged that Mrs. Chappelear had ". . . devised and bequeathed all of her property unto your petitioner, as Trustee, on the terms and conditions in said Will contained, . . ." Throughout the sale proceeding Johnston admittedly acted in a dual fiduciary capacity, as petitioner-executor and as trustee holder of the legal title (para. 11 of Answer of Harts and wife, R. 38; para. 14 of Johnston's Answer, R. 29).

In its order of sale of June 6, 1938, the County Court of Logan County confirmed the trust and the estates under the will by finding that the allegations of the petition were true (R. 274). The County Court also found the fair cash market value of the equity in the farm to be $15,000 (R. 275).

At the sale, held on July 2, defendant Harts, brother-in-law of Johnston, was high bidder at $6,472 for the equity, including all 1938 crops; he took the property subject to the mortgage indebtedness but did not assume to pay such indebtedness.

Cosby, Sr. was very dissatisfied with the result of the sale and indicated that he was going to get the sale set aside (R. 201-202, R. 323-324, R. 325). Edwin Mills, who was attorney for Johnston, had several conversations with Cosby, Sr. in which the latter expressed his dissatisfaction (R. 90-92). Mills prepared a draft of an adverse report of sale which ended as follows:

> "The undersigned further respectfully reports unto the Court that said purchase price represents a valuation of said property at the rate of $110.00 per acre, which the undersigned believes to be an inadequate price for said real estate; and the undersigned further reports unto the court that at said sale there were only two bidders upon the whole of said premises and that in the opinion of the undersigned said property did not bring an adequate amount of money." (Amend. Compl., para. 6, R. 5; Plfs.' Ex. 1, R. 276-278, as corrected.)

Harts learned immediately after the sale that Cosby was going to file objections and talked the matter over with Johnston ". . . a great many times . . ." (R. 167-169.) When Mills took the above report to Johnston he was not satisfied with it and, upon Johnston's request, Mills drew a line through each line of the paragraph above quoted and inserted immediately thereafter the following paragraph:

> "The undersigned further respectfully reports unto the Court that he is informed and believes that certain persons interested in said estate and in said premises will file objections to the confirmation of said sale and that therefore the undersigned submits the matter to the Court without a request either for confirmation of (sic) rejection of said sale." (Amend. Compl., para. 6, R. 6; Plfs.' Ex. 1, R. 278, as corrected.)

The executor's report, in its final form, was filed on July 6 and on July 16 Cosby, Sr. filed his objections to the report, prepared by Mills and contained in a blue backed cover which bore the inscription "Edwin C. Mills, Attorney-at-Law, Lincoln, Illinois" (R. 304-305), although Mills testified he told Cosby, Sr. that he could not represent him because he represented the executor (R. 91). The objections alleged that the price received for the farm was inadequate and did not constitute a fair valuation of the premises, that the sale was inadequately advertised so that bidders and interested persons were unaware of the sale and were not present; that there were only two bidders at

the sale and that there were other persons ready, willing and able to bid a larger amount, if the property were ordered resold, and concluded with the statement "All the matters and things this defendant says he is ready to prove on the hearing hereof as this Honorable Court shall direct . . . , wherefore he excepts to said report and prays that after full consideration by the Court said report may be disapproved and said real estate be ordered to be resold." (R. 280-281.)

On July 18 the court continued the hearing on the report to August 2, on which day it set the exceptions for hearing also. Cosby, Sr. died on July 21, leaving as his only heirs his widow and son, plaintiffs in this suit. Harts (R. 169), Johnston (R. 185), Mills and Judge Stringer (R. 92-93) of the County Court of Logan County all knew of Cosby, Sr.'s death on July 21. But when the report and exceptions came on for hearing on August 2, Mills alone was present in court, and when the fact of Cosby's death was referred to, the Judge observed in substance (Mills' testimony, R. 93):

> " 'These objections then can be overruled, there is no one here to push them or present them . . .'."

and Mills said " '. . . . I presume so . . .'." and the Judge then entered the order overruling the objections and confirming the sale (R. 282-284). Johnston executed his deed conveying the farm to Harts on August 3, 1938.

The plaintiffs had arrived in Lincoln for the first time on July 24, 1938 to attend Cosby, Sr.'s funeral, had met Johnston, who had told Mrs. Milem that the Skelton farm had to be sold (R. 110-111). But Johnston did not tell Cosby Jr. or Mrs. Milem that the hearing on the report and the objections to the sale had not been held at the time of Cosby, Sr.'s death but was set for August 2, that Cosby, Sr. was not represented by counsel or that he, Johnston, had refused in his report of sale to make a recommendation for approval or disapproval of the sale but had left the matter to rest with the court on Cosby, Sr.'s objections (R. 141, 110-113).

After Cosby, Sr.'s funeral, Johnston suggested and Mrs. Milem agreed that he act as administrator for Cosby Sr.'s estate. He told Mrs. Milem that she had nothing to worry about, that he would take care of everything for her and her son and that they need not remain on in Lincoln (R. 112).

On Saturday, July 30, three days before the date set for the hearing on the objections and the report of sale, Johnston drove the plaintiffs down and put them on the train bound for California (R. 113). There was no substitution of the plaintiffs as parties to the sale proceeding and nothing was done by Johnston or any one else to provide Cosby, Jr. or Mrs. Milem with representation at the hearing on August 2, or to obtain representation to present Cosby, Sr.'s objections at the hearing.

About one year later, on August 25, 1939, Mrs. Milem and her son executed a quit claim deed (prepared by Harts' attorney at his request—R. 174) for the farm to Harts, when Cosby, Jr. was still a minor, about 17 years of age. Subsequently, in May, 1944, he and his mother filed a disaffirmance of the quit claim deed in the Office of the Recorder of Logan County, Illinois (R. 318-321); and the District Court set aside the quit claim deed as to Cosby, Jr. (R. 421).

On July 1, 1939, Johnston, as executor and trustee under the Chappelear will, and also as administrator of the estate of Cosby, Sr., filed a petition in the Circuit Court of Logan County to construe the Chappelear will. On March 25, 1940 the Circuit Court decreed that the trust created by the will was void as violating the rule against perpetuities, leaving the property in the estate to descend as intestate property to Cosby, Sr. On October 15, 1940, a little more than two years after the sale proceedings, the Illinois Supreme Court affirmed the decree of the Logan County Court construing the will. *Johnston v. Cosby,* 374 Ill. 407, 29 N.E. (2d) 608 (1940). The opinion of the court in that case makes no reference to the proceeding to sell real estate to pay debts and Harts, the purchaser at the sale of the Skelton farm, was not a party to that suit.

In November, 1943, Cosby, Jr., became of age, and six months later, after filing his notice of claim to the Skelton farm (R. 318-321), he joined with his mother in filing the present suit on May 22, 1944, seeking to recover the Skelton farm on the ground that the plaintiffs were not bound by the decrees of the Logan County Court by reason of the failure to give them notice as parties and an opportunity to be heard and also by reason of fraud and collusion of Johnston and Harts. After a trial of the issues, the court concluded as a matter of law that the County Court of Logan County had jurisdiction of the necessary parties to enter the orders of sale and confirmation and that such

orders could not be attacked in the present suit but only in the County Court of Logan County, that Mrs. Milem was barred by estoppel of her quit claim deed of August 25, 1939 and that plaintiffs' amended complaint, except for the setting aside of the quit claim as to Mark Barrett Cosby, Jr., be dismissed for want of equity (R. 419-421).

Plaintiffs appealed said cause to the United States Circuit Court of Appeals for the Seventh Circuit, where said appeal was, on April 29, 1948, duly argued and submitted by counsel (R. 430). Thereafter on July 23, 1948, said Circuit Court of Appeals filed its opinion in said cause, affirming the judgment of the District Court (R. 431-439).

Jurisdiction of This Court

The jurisdiction of this court is based upon Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U.S.C.A. §347, providing for review by this court, by certiorari, of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on July 23, 1948 (R. 439). A petition for rehearing, duly filed by plaintiffs on August 23, 1948, within the time extended by the Circuit Court of Appeals (R. 439-440), was denied by said Circuit Court of Appeals on September 29, 1948 (R. 452). The time in which to file petition for certiorari in this Court was extended to and including January 27, 1949 by the order of this Court (R. 455).

Questions Presented

The questions presented by petitioner herein for certiorari are:

1. Whether the judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, denying that Federal courts of equity have jurisdiction of this suit and limiting your petitioner's remedy to some action in the state courts is an improper denial of the constitutional jurisdiction of Federal courts of equity.

2. Whether it was a denial of due process of law in violation of the 14th Amendment to the U. S. Constitution for the County Court of Logan County, Illinois, to enter its decrees of sale and confirmation effecting a conveyance of your petitioner's property to the defendant Harts, without joining your petitioner as a party or giving him notice and an opportunity to be heard either on his own objections or on objections filed by his supposed predecessor in interest.

3. Whether your petitioner is constitutionally bound by the decrees in a proceeding in which he was not a party and had no opportunity to be heard, by reason of an alleged "privity" with one who was a party but who, within the knowledge of the Logan County Court and the remaining parties, died before the confirmation decree was entered.

4. Whether your petitioner is constitutionally bound by the decrees in a proceeding in which he was not a party and had no opportunity to be heard, by reason of an alleged "privity" with one who was a party, based upon the decision in a subsequent case that a will was void, although the Logan County Court found the trust and interests under the will to be valid so that no privity could exist.

5. Whether your petitioner is constitutionally bound by the decrees in a proceeding in which he was not a party and had no opportunity to be heard, although he was a devisee and claiming an interest in the property sold, and where the executor and trustee under the will, while undertaking to represent your petitioner's interests against the executor's own petition for sale, suffered the decree of confirmation to be entered in derogation of your petitioner's rights without any contest in his behalf.

6. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court, holding your petitioner bound by the said decrees of sale and confirmation of the Logan County Court and denying relief from said decrees constituted a violation of the 5th Amendment to the U. S. Constitution in giving unwarranted effect to the decrees of the Logan County Court.

7. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court, improperly denied your petitioner equitable relief from the decrees of the Logan County Court.

Reasons Relied on for the Allowance of the Writ

This case presents several novel and important questions of due process of law under the 14th and 5th Amendments to the U. S. Constitution, which have not been, but should be, settled by this Court; the opinion of the Circuit Court of Appeals for the Seventh Circuit in this case appears to be at variance with applicable principles laid down by this Court in analogous cases involving due process of law.

Also, the decision of the Circuit Court of Appeals in this case, in denying the jurisdiction of the Federal courts of

equity herein, appears to be directly in conflict with the constitutional jurisdiction of such courts in cases of diverse citizenship, as that jurisdiction has been expounded in the decisions of this Court and the decisions of the circuit courts of appeals in the other circuits.

Prayer

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the 7th Circuit to the end that the judgment of said Court of Appeals in the said cause be reviewed by this Court, as provided by law, and that upon such review, the judgment of said Court of Appeals in said cause, of date July 23, 1948, be reversed as to your petitioner, and that your petitioner have such other relief as to this Court may seem appropiate.

B. Lacey Catron,
Herbert C. Brook,
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the 7th Circuit, which petitioner here seeks to have reviewed, appears on pp. 431 to 438 inclusive of the printed transcript of the record filed herewith, and is reported in 169 F. (2d) at pp. 689-694.

Statement of the Case

The essential facts of the case are fully stated in petitioner's petition for writ of certiorari, and in the interest of brevity are not repeated here.

Specifications of Error to Be Urged

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court dismissing the amended complaint for want of equity.

2. In holding that the decrees of the Logan County Court in the prior sale proceeding were valid and binding on Cosby Jr. and his interest in the property sold.

3. In holding that Cosby Jr. was in privity with Cosby Sr. at the times the decrees of sale and confirmation were entered in the Logan County Court.

4. In holding that the Logan County Court, in the prior sale proceeding, had jurisdiction of all necessary parties to enter a valid decree.

5. In holding that the Logan County Court, in the prior sale proceeding, was empowered to enter valid decrees of sale and confirmation, binding on Cosby Jr. and his interest in the property sold, without joining him as a party and without giving him notice or an opportunity to be heard.

6. In holding that the Federal courts are not the proper forum for Cosby Jr. to seek relief from the decrees of the Logan County Court in the prior sale proceeding.

7. In holding that the Federal courts of equity do not have jurisdiction of the present suit for relief from said decrees of the Logan County Court, although the plaintiffs herein were of diverse citizenship from the defendants.

8. In failing to hold that Cosby Jr. was, under the applicable Illinois statutes, a necessary party to the prior sale proceeding in the Logan County Court, and that his nonjoinder therein caused the decrees of that Court to constitute a deprivation of his property without due process of

law under the 14th Amendment to the U. S. Constitution; and that the judgment of the District Court in this case gave unwarranted effect to the decrees of the Logan County Court and therefore constituted a violation of the 5th Amendment to the U. S. Constitution.

9. In failing to hold that the decree of confirmation entered by the Logan County Court in the prior sale proceeding, with knowledge of the death of Cosby Sr. but without joining Cosby Jr. as a party or giving him notice and an opportunity to be heard, constituted a deprivation of his property without due process of law contrary to the 14th Amendment to the U. S. Constitution; and that the decision of the District Court, in holding Cosby Jr. bound by the confirmation decree, gave unwarranted effect to the decrees of the Logan County Court and constituted a violation of the 5th Amendment to the U. S. Constitution.

10. In failing to hold that the prior sale proceeding in the Logan County Court was non-adversary, fraudulent in law, and not valid to bind Cosby Jr. or his interest in the land sold and that the decision of the District Court, in holding Cosby Jr. and his interest in the land bound by the decrees of the Logan County Court, gave unwarranted effect to those decrees and constituted a deprivation of his property without due process of law contrary to the 5th Amendment to the U. S. Constitution.

11. In failing to hold that Cosby Jr. was entitled, in the Federal courts of equity, to avoid and obtain relief from the sale and confirmation decrees entered by the Logan County Court in the prior sale proceeding, and to redeem and recover the land which was sold from the defendant Harts, to the extent of Cosby Jr.'s 2/3rds interest in the premises.

Summary of Argument

Cosby Jr.'s contentions are these: (1) The lack of an opportunity to be heard is a matter of substance over which the federal courts of equity must take jurisdiction when called upon to do so by a person of diverse citizenship. (Point I, pp. 12-15). (2) That, at the time of the confirmation decree in the Logan County Court, Cosby Jr. had a vested interest in fee simple in the land sold and the right to redeem the land from the sale, of which rights he could not lawfully be deprived without a hearing or an opportunity for a hearing. (Point II, pp. 15-17). (3) That the knowledge on the part of the Logan County Court of the

death of Cosby Sr. made any possible "privity" between Cosby Sr. and Cosby Jr. entirely ineffective, and the attempt by that Court to confirm the sale of the property to another, without giving Cosby Jr. an opportunity to be heard either in his own behalf or on the objections filed by Cosby Sr., constituted a deprivation of his rights without due process of law; and the decisions of the District Court and the Court of Appeals in this case, giving binding effect to the former decree of the County Court, without allowing Cosby Jr.'s redemption and recovery of the land as prayed in his complaint, constitute a deprivation of his property rights without due process of law. (Point III, pp. 17-24). (4) That Cosby Jr. was in the position of a stranger to the sale proceeding in the Logan County Court because there was no effective privity between him and Cosby Sr., and therefore, he cannot be constitutionally bound by the sale and confirmation decrees of that Court. (Point IV, pp. 24-29). (5) That the confirmation decree of the Logan County Court cannot constitutionally be held to bind the interests of Cosby Jr., because as a result of the conduct of the fiduciary, Johnston, the sale proceeding was rendered wholly non-adversary and fraudulent in law. (Point V, pp. 29-33). (6) That whether or not the decrees of the Logan County Court were invalid against Cosby Jr., his lack of an opportunity to be heard entitled him to equitable relief from those decrees against the purchaser, Harts, who took with full notice and knowledge of the defects in the sale proceeding. (Point VI, pp. 33-34).

Argument

I.

The proper remedy is by this suit in equity in the Federal Courts, and the Circuit Court of Appeals erred in holding that Cosby Jr. is limited to relief in the Logan County Court.

The opinion of the Circuit Court of Appeals (R. 43, 437) recognizes that the confirmation decree of the Logan County Court in the sale proceeding was "undoubtedly erroneous" but holds that the "irregularities" of that proceeding did not make the confirmation "void" as to plaintiffs but only "voidable" by *action in the Logan County Court*, citing *Claflin v. Dunne*, 129 Ill. 241, 21 N.E. 834 (1889). In so holding, we submit the Circuit Court of Appeals has totally misconceived the nature of the defects in the sale proceeding and overlooked fundamental principles of federal equity jurisdiction. The defects in the sale proceeding are not mere technical or formal irregularities. In

this case the plaintiffs were not parties to the sale proceeding and have never had an opportunity, either themselves or through their supposed predecessor in title, for a fair hearing on the confirmation issues, and this fact was known to the parties and the court before the confirmation decree was entered. The only defects the correction of which would be limited to the county court are mere formal irregularities. The true line of demarcation between such formal irregularities, properly remedied by *coram nobis* or bill of review on the one hand, and the lack of an opportunity to be heard on the other hand, was made by this Court in 1879 in the case of *Barrow v. Hunton*, 99 U. S. 80, 83, 25 L. Ed. 407 (1879). This distinction was further explained, elaborated, and approved by this Court in *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. Ed. 547 (1884); *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 32 L. Ed. 630 (1889); and *Marshall v. Holmes*, 141 U. S. 589, 596-600, 35 L. Ed. 870, (1891).

The lack of an opportunity to be heard is always a matter of substance. Where it results from lack of proper service or conscious denial by the court of a hearing, the court is said to have lacked jurisdiction or to have exceeded its jurisdiction, and the decree of the court will be held void against a person so denied due process in violation of the 14th Amendment. The person affected can question the decree collaterally, either defensively or offensively. *Essanay Film Mfg. Co. v. Kane*, 258 U. S. 358, 66 L. Ed. 658 (1921) and cases cited at page 362 therein. Or such person can obtain relief from the judgment by an independent suit in equity in the federal court. *Simon v. Southern Railway*, 236 U. S. 115, 59 L. Ed. 492 (1915).

At page 5 of its opinion, the Circuit Court of Appeals states that a court of equity will not interfere with a judgment obtained in another court merely because it is erroneously or irregularly entered, and then concludes:

> "Hence, whether such proceeding be described as a collateral or direct attack, it appears to be available only under such circumstances as render the original judgment or decree void and subject to collateral attack."

This conclusion does not follow from the premise and is directly contrary to all of the authorities on the subject. Where a court has obtained jurisdiction of a person but, without the knowledge of the court, that person has in fact been deprived of an adversary hearing by some misfor-

tune, such as accident, mistake or fraud, and without his own fault, the decree of the court, though valid and not subject to collateral attack, is "voidable" by the injured person in an independent suit in equity such as the present suit, (*Restatement, Judgments* (1942), c. 5, § 112, p. 532, et seq.); and the suit in equity in such cases is not a "collateral" attack on the decree (*Restatement, Judgments* (1942), § 112, *Comment* f., pp. 536-7). Numerous decisions of this and other federal courts support the above rule. *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 35 L. Ed. 870; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. Ed. 533; *Simon v. Southern Railway Company*, 236 U. S. 115, 59 L. Ed. 492; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 65 L. Ed. 205; *Essanay Film Mfg. Co. v. Kane*, 258 U. S. 358, 66 L. Ed. 658; *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593 (C. C. A. 8th, 1903); *Chicago, R. I. & P. Ry. Co. v. Callicotte*, 267 Fed. 799 (C. C. A. 8th, 1920); *U. S. v. Mashunkashey*, 72 F. (2d) 847 (C. C. A. 10th 1934); *Hewitt v. Hewitt*, 17 F. (2d) 716 (C. C. A. 9th, 1927); a large number of pertinent cases are collected and reviewed by the Court of Appeals for the Ninth Circuit in *Nelson v. Meehan*, 155 Fed. 1 (C. C. A. 9th 1907).

Previous to the decision in the present case the Circuit Court of Appeals for the Seventh Circuit has given full support to the above rule, *Graver v. Faurot*, 76 Fed. 257 (C. C. A. 7th 1896).

In the present case, the Circuit Court of Appeals was apparently reluctant to hold that plaintiffs had a proper remedy in the federal courts as long as there *might* be a remedy available to them in the Logan County Court. We have shown in Point II of plaintiffs' petition for rehearing, (R. 447-449) that, because of the peculiar circumstances and knowledge of the county court in the sale proceeding, it is very unlikely that plaintiffs had a remedy in the state courts by bill of review or any type of action other than an original action in equity such as the present suit.

But the fact that plaintiffs may have had a remedy in the state courts is immaterial; the federal court is bound to take jurisdiction of all cases where equities of substance are involved and the parties are of diverse citizenship, and the federal court may not lawfully renounce that jurisdiction. *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593, 602-605 (C. C. A.8th, 1903) citing *Smith v. Ames*, 169 U. S. 466, 516, 42 L. Ed. 819; *Arrowsmith v. Gleason*,

129 U. S. 86, 98, 32 L. Ed. 630, and other cases. The federal court is bound to take jurisdiction even of a will construction suit, although probate proceedings involving the will are pending in the state court. *Blacker v. Thatcher*, 145 F. (2d) 255 (C. C. A. 9th 1944), *certiorari* denied February 26, 1945; 324 U. S. 848 (1945).

II.

At the time of the confirmation decree in the Logan County Court Cosby Jr. had a two-thirds interest in fee simple in the Skelton farm and the right to redeem the land from the sale, and could not lawfully be deprived of said property without an opportunity for judicial hearing prior to confirmation.

In Illinois, a proceeding to sell real estate of a decedent is not *ex parte* but is essentially hostile in every respect to the interests of the heirs and devisees. *Gibson v. Roll*, 27 Ill. 88 (1862). Thus personal jurisdiction over the heirs, devisees and all persons "having or *claiming* any interest" in the land to be sold is required by statute.[1] And the proceeding is not *in rem* but is strictly *inter partes* so that any person who has an interest in the land but who is not made a party will not be bound by the proceeding. *Alward v. Borah*, 381 Ill. 134, 44 N.E. (2d) 865 (1942); *Leninger v. Reichle*, 317 Ill. 625, 148 N. E. 384 (1925); *Heppe v. Szczepanski*, 209 Ill. 88, 70 N. E. 737 (1904).

A non-party holding an interest will not be bound by the sale proceeding even though his interest did not vest until after the proceeding had begun. *Botsford v. O'Conner*, 57 Ill. 72 (1870). The title to decedent's land descends directly to his heirs or devisees, subject only to a power in

1. ILL. REV. STAT., 1937 c. 3 provides in part as follows:
"100. Petition — Parties] § 99. The mode of commencing the proceedings for the sale of real estate in such cases shall be by the filing of a petition by the executor or administrator in the circuit or county court of the county where letters testamentary or of administration were issued. The widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservator of such as have conservators, and all persons holding liens against the real estate described in the petition, or any part thereof, or having or claiming any interest there in possession or otherwise shall be made parties. If there are persons interested in the premises whose names are not known, then they shall be made parties by the name of unknown owners. [As amended by act approved June 15, 1887. In force July 1, L. 1887, p. 3.]
"103. Summons.] § 102. Upon the filing of the petition, summons shall be issued, served and returned as in other civil cases. [As amended by act approved July 2, 1937. L. 1937, p. — (H. B. No. 333).]"

the administrator or executor to subject it to sale to pay debts strictly in the manner provided by statute. *Alward v. Borah*, 381 Ill. 134, 136, 138, 44 N. E. (2d) 865 (1942); *Burr v. Bloemer*, 174 Ill. 638, 640, 51 N. E. 821 (1898); *Anderson v. Shepard*, 285 Ill. 544, 548, 121 N. E. 215 (1918). The title of the heirs or devisees is not cut off by the decree of sale but is retained by them until a confirmation decree which is valid and binding on them has been entered. *LeMoyne v. Harding*, 132 Ill. 23, 28, 23 N. E. 414 (1890), approved in *Alward v. Borah*, 381 Ill. 134, 136, 44 N. E. (2d) 865 (1942). The heirs or devisees have not only the title but also the right to protect their title by redemption of the land by payment of the indebtedness of the estate (*Retzinger v. Retzinger*, 337 Ill. 378, 169 N. E. 176 (1929), or by asking for a resale and substituting a purchaser who will agree to pay a higher price on resale and make a binding advance bid or guarantee against loss on resale. (*Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306 (1911); *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580 (1899)).

The right of the heirs or devisees to redeem the land before confirmation is such that where a confirmation decree has been improperly entered it will be set aside in order to give them an opportunity to redeem, even though there has already been a hearing on the issues of confirmation and it has been shown that the sale is one which merits confirmation. *Retzinger v. Retzinger*, 337 Ill. 378, 382, 169 N. E. 176 (1929).

By the Illinois statute[2], a judicial hearing of any objections or exceptions filed to the report of sale is expressly made a condition precedent to the entry of a valid decree of confirmation. Obviously, a true judicial hearing is required as a matter of constitutional law where objections have been filed. *Londoner v. Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112 (1908).

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2. ILL. REV. STAT., 1937, c. 3 provides as follows:

"110. Sale—Time of—Notice—Terms—Return.] § 109. . . . It shall be the duty of the executor or administrator making such sale within ten days thereafter, to file in the office of the Clerk of said Court a complete report of said sale, giving a description of the premises sold, to whom, where, and upon what terms sold, and a general statement of the manner in which the terms of the decree were executed. Any person interested in the premises sold, and any creditor of the estate may, within fifteen days after such sale file exceptions to such report, and upon the hearing thereof the Court may approve such report and confirm the sale, or disapprove the same and order the premises to be re-sold. [As amended by act approved June 21, 1933. L. 1933, p. 3.]"

III.

Cosby Jr. was not, either himself or through his predecessor in title, given an opportunity by the Logan County Court to litigate or protect his title, and the decree of confirmation directing a conveyance of the title was a deprivation of his property without due process of law contrary to the 14th Amendment; the decisions of the District Court and the Court of Appeals, by giving conclusive effect to this prior decree of the Logan County Court, were a violation of the 5th Amendment.

The doctrine of *res judicata* presupposes a valid judgment. That doctrine is based on the assumption that the person to be affected by a judgment or someone with whom he was in "privity" has litigated or had an opportunity to litigate, in adversary proceedings, the same matter in a former action in a court of competent jurisdiction. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 474-476, 62 L. Ed. 1215, 1220-1221 (1918); *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22 (1940); *Hedlund v. Miner*, 395 Ill. 217, 231, 69 N. E. (2d) 862 (1946); *Newberry Library v. Board of Education*, 387 Ill. 85, 91-92, 55 N. E. (2d) 147, 150-151 (1944). And as the County Court could not, consistently with the 14th Amendment, enter a judgment directing a conveyance of property without giving an owner thereof a hearing or an opportunity to be heard, so the District Court and the Circuit Court of Appeals can not, without disregarding the requirement of due process, give a conclusive effect to the County Court decree against Cosby Jr., who was neither a party nor in effective privity with a party therein. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 62 L. Ed. 1215 (1918); *Hedlund v. Miner*, 395 Ill. 217, 69 N. E. (2d) 862 (1946); *Botsford v. O'Conner*, 57 Ill. 72 (1870).

> As said in *Restatement, Judgments* (1942), § 118, p. 570: "A basic requirement of an action which can lead to a valid judgment is that a procedure should be adopted which in the normal case will give to the parties an opportunity for a fair trial which is reasonable in view of the requirements of public policy in the particular type of case."

It is argued by the defendants and held by the Court below that the decision in *Johnston v. Cosby*, 374 Ill. 407, 29 N. E. (2d) 608 (1940) decided some two years after the sale proceeding, established that Cosby Jr. was "in privity" with

Cosby Sr., who was determined to take the entire estate of Mrs. Chappelear by intestacy. But the adoption of that view ignores the fact that no procedure was taken after Cosby Sr.'s death in order to give Cosby Jr. an opportunity for a fair trial either on his own behalf or on the objections filed by Cosby Sr.

On August 2, 1938, at the time set for the hearing the sole person to appear before Judge Stringer was Edwin Mills, who was the attorney for Johnston, as Executor, and whose name appeared as attorney on the blueback cover of Cosby Sr.'s objections then on file. Both Judge Stringer and Mills knew that Cosby Sr. was dead, having died July 21, 1938. In the District Court Mr. Mills testified that he and Judge Stringer were present, that either he or Judge Stringer mentioned that Cosby Sr. had passed away, and that the Judge then said to him in substance:

> " . . . These objections then can be overruled, there is no one here to push them or present them . . . "

and Mills said:

> " " . . . I presume so . . . "

and that the Judge then entered the Order. (R. 93.)

The Court heard no evidence or any argument of counsel either for or against the objections or the report of sale; there was, in fact, no judicial hearing.

Where a person is made a party to the suit and given notice by summons or other legal process, it is assumed, unless the contrary is brought to the attention of the Court, that the party will have a fair opportunity to take the proper steps in his own behalf and for his own protection, even though he is in fact incompetent to do so. *Simon v. Craft*, 182 U. S. 427, 436, 45 L. Ed. 1165 (1901). But in the case of a party to an action, if he comes into court and files objections or pleadings, the court cannot render a constitutionally valid judgment against him without giving him a fair opportunity to be heard on his pleadings; the judgment will be held a violation of the Fourteenth Amendment. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Londoner v. Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112, (1908); *Burket v. Reliance Bank & Trust Co.*, 367 Ill. 196, 201, 11 N. E. (2d) 6, 8 (1937); *Rabbit v. Weber & Co.*, 297 Ill. 491, 496, 497, 130 N. E. 787 (1921); *Hultberg v. Anderson*, 252 Ill. 607, 615, 97 N. E. 216 (1912). In the latter case, the court said, at Page 615:

> "Under the due process clause of the constitution a party is not only entitled to notice of the proceeding

> against him but he is also entitled to be heard in his defense. Of what avail is it to summon a party into court if after he appears the Court arbitrarily refuses to hear him? A judgment pronounced without any judicial determination of the facts which alone can support such judgment is merely the arbitrary edict of the judge, and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons."

And this is true even though the Court is said to have "jurisdiction" of the party.

Certainly, if Cosby Jr. is to be bound by "privity" with Cosby Sr., he must be given an opportunity to be heard on Cosby Sr.'s objections. If he is to stand in the same position as his predecessor, he must be given the same opportunity to be heard to which his predecessor was entitled. Any other ruling would deny the protection of due process to a non-party who is less able to protect himself than one who has had notice as a party to the action.

In ignoring the constitutional issue and treating the present case as a question of the proper remedy, the Circuit Court of Appeals has failed to appreciate the significance of the fact that the Logan County Court failed to provide a hearing while it was aware of the death of Cosby Sr. There is a fundamental distinction in the law of judgments between a judgment which is "void" or invalid as to a particular person, because of lack of reasonable process or the conscious failure of the court to provide an opportunity for a hearing, and a judgment which is valid, but voidable, because through misfortune, without any fault on the part of the court or the process, a person has in fact had no opportunity to be heard. *Restatement, Judgments* (1942) c. 2, § 6, c. 5, § 118.

Prior to the present case it has been uniformly held, by courts having occasion to consider the question, that where a court knows of the death of one of the parties, occurring before hearing, it cannot in due process enter a judgment which will bind the successors in interest of the party dying, without giving the successors an opportunity to be heard, *even though the successors stand "in privity" with the deceased party. Brown v. Fletcher's Estate,* 210 U. S. 82, 90-91, 52 L. Ed. 966, 971 (1908); *Hopkins v. Curtis* 43 R. I. 19, 21, 109 Atl. 711, 712 (1920); *Harris v. Chicago Title and Trust Company,* 338 Ill. 245, 266, 170 N. E. 285, 294

(1930); *Welch v. Louis*, 31 Ill. 446 (1863); *Hoffman v. Hanley*, 187 Ill. App. 551, 553 (2nd Dist.) (1914); *Rives v. Stanford*, 188 Okla. 108, 109, 106 P. (2d) 1101, 1103 (1940).

This Court has held that a judgment against the estate of a party who was known by the Court and parties to have died pending suit, is not entitled to full faith and credit as against the executor and the legatees who resided in another state and were not properly brought into the court rendering the judgment. *Brown v. Fletcher's Estate*, 210 U. S. 82, 52 L. Ed. 966 (1908), involved an attack on a judgment entered in an accounting proceeding brought in Massachusetts against a Michigan resident who died pending the suit. After the party's death the original Massachusetts suit had been revived against the Massachusetts administrator but had not been revived against either the Michigan executor or the Michigan legatees. In holding that the Massachusetts judgment, insofar as it pertained to property which had passed to the Michigan executor, was not entitled to full faith and credit but could be collaterally attacked in Michigan, this Court said, at page 94:

> "On his death the jurisdiction of the Massachusetts court was not wholly destroyed, but suspended until the proper representative of Fletcher was made a party. The Massachusetts administrator was made a party and did appear, and the decree rendered unquestionably bound him, but the executors, the domiciliary representatives of the decedent's estate, did not appear and were not brought into court. The Massachusetts administrator was not a general representative of the estate, and could not bind it by any appearance or action other than in respect to the property in his custody. If the home estate was to be reached it had to be reached by proceedings to which the home representatives were parties."

The Court adopted the language used by the Supreme Court of Michigan that:

> " 'It must be held that the proceedings in the Massachusetts court abated with the death of Mr. Fletcher, that its revivor was possible only because there was brought into existence, by the exercise of the sovereign power of the State, a representative of the decedent, clothed with certain powers with respect to the estate of decedent within the State, and that the decree thereafter rendered in the suit so revived is without effect save upon the administrator of the estate who was in

accordance with the law of the place brought upon the record.' " (pp. 94-95).

In *Harris v. Chicago Title & Trust Company,* 338 Ill. 245, 170 N. E. 285 (1930), the defendant, Russell, who was a resident of Pennsylvania, died pending a suit in Illinois involving the ownership of certain shares of stock. The suit was revived against the Illinois administrator, but not against Russell's Pennsylvania executors. In holding that the suit could not affect the legal title to the stock in the Pennsylvania executors, the Supreme Court of Illinois said, at page 266:

> "On the death of Russell the legal title to these shares of stock vested in his Pennsylvania executors and they were inventoried there as a part of his estate. The decree entered here would not be binding on them without making them parties to the proceeding and could not take from them their title and vest it in another. It follows that the beneficiary of such a decree would not acquire title to the property, and the decree therefore was not such as could command full faith and credit under the comity relation of State. (*Baker v. Baker, Eccles & Co. supra; Brown v. Fletcher, supra.*) When Russell died there was no one before the court who could be compelled to transfer the stock in accordance with the decree, and the decree could avail plaintiff in error nothing."

And the court said again, at page 291:

> "Under the fundamental principle of due process requiring that rights of parties may not be adjudicated unless they are in court, with an opportunity for a hearing, the legal title to one-half (1/2) of this stock cannot be taken from the Pennsylvania executors without making them parties to the suit. This was not done."

In the case of *Hopkins v. Curtis,* 43 R. I. 19, 109 Atl. 711 (1920), there was a bill to construe a will and trust agreement brought by trustees under the will. Under the Rhode Island procedure the cause was certified to the Supreme Court of that State for determination of controverted questions of law and fact. It was necessary that the Supreme Court then hold a hearing before making such determination. The cause was heard in the Supreme Court on February 9, 1920. The court's opinion was filed on March 5th following. On March 26, an affidavit was filed that Henrietta Foster, a respondent, had died on February 8, before

the Supreme Court hearing; also another respondent had been declared insane on February 17, and Amelia Curtis, another respondent had died on February 22. The trustee moved for entry of an order directing the Superior Court to enter a decree *nunc pro tunc* as of February 6, 1920, which was before the hearing in the Superior Court, before the death of Henrietta Foster and before the certification of the cause to the Supreme Court. The Supreme Court held that it could not enter a decree *nunc pro tunc* as of a date prior to the death of Henrietta Foster because, by reason of her death, that part of the estate going to her and then to her heirs was not represented at the hearing. In so holding, the court said, at page 712:

> "In such circumstances a fundamental principle of judicial procedure would prevent the entry of a decree which should attempt to bind those who might be entitled to claim under her. An opportunity to be heard must be given to them or to someone legally qualified to represent them in order to conclude their rights. The complainant would shut off such rights by the entry of a decree as of a day during the lifetime of Mrs. Foster and before that of the hearing. There is no authority worthy to be followed which would justify the entry of such a decree."

The same rule is applied where, in liquidation or receivership proceedings, a receiver or liquidator has received assets while litigation was pending involving the same assets. *Evans v. Illinois Surety Co.*, 319 Ill. 105, 110-111, 149 N. E. 802, 804-805 (1925); *People v. Chicago Lloyds*, 391 Ill. 492, 507-508, 63 N. E. (2d) 479, 487 (1945).

The reasons for the above decisions are obvious. Although public policy may necessitate binding all persons who take "in privity" with a party by reason of an unknown death of the party pending suit, it is manifestly contrary to ordinary standards of fairness to bind the successors without a hearing after the court and the remaining parties are put on notice of their interests by knowledge of the death of the predecessor. In such circumstances, there is no reason of public policy why the duty to give the successors a hearing by the usual modes of procedure should not be put upon the court and the remaining parties to the suit. The conscious failure of the court to follow "established modes of procedure" constitutes a lack of due process which renders the judgment void. *United States v. Walker*, 109 U. S. 258, 27 L. Ed. 927 (1883); *Welch v. Louis*,

31 Ill. 446, 455-456 (1863); *Armstrong v. Obucino,* 300 Ill. 140, 133 N. E. 58 (1921).

Once the court and parties have notice of the death of a party, any action taken will be at the peril of the remaining parties, and no mistake as to the interest of the party dying, or as to the proper successors in interest to be joined, will excuse the non-joinder of the persons actually succeeding to the title, or make the judgment binding against them. *Brown v. Fletcher's Estate,* 210 U. S. 82, 94, 52 L. Ed. 966 (1908); *Harris v. Chicago Title & Trust Co.,* 338 Ill. 245, 170 N. E. 285 (1930); *Hoffman v. Hanley,* 187 Ill. App. 551, 553 (2d Dist. 1914); *Rives v. Stanford,* 188 Okla. 108, 109, 106 P. (2d) 1101, 1103 (1940).

The case of *Hoffman v. Hanley,* 187 Ill. App. 551, 553 (2d Dist. 1914), is squarely in point in the instant case. In that case the mortgagee had filed a bill to foreclose a mortgage against John Hanley and his wife who held the title to the land as tenants in common. While the suit was pending Mrs. Hanley died intestate, leaving five children surviving. Her death had been suggested of record, but on the mistaken assumption that she had in her lifetime only a dower interest in the land, the foreclosure proceeded to a decree, finding that she had only a dower interest, without making her heirs parties. The mortgagee had bid in the property at the master's sale and had assigned the master's certificate of purchase to one who in due time had received a master's deed to the premises. Later, when the mistake as to the title was discovered, the mortgagee and purchaser filed a bill to subject the interest of the five children to the lien of the mortgage. The court held that the foreclosure and sale were entirely ineffective to pass any title to the purchaser at such sale.

The court also held that the mortgage indebtedness had been discharged by the sale and that the rule of *caveat emptor* applied. In reference to the hardship on the purchaser, the court said at page 554:

> "The hardship here comes from a mistake by a purchaser at a judicial sale as to the title he will acquire by his purchase. Many cases have arisen where such mistakes have been made, and the law has been long settled that the rule of *caveat emptor* applies."

On the above authorities it clearly makes little difference, where the court and parties know of the death of one of the parties prior to judgment, whether or not "privity"

is held to have existed between the deceased party and his successors in interest. Under the circumstances the successors cannot be bound by the decree because both they and their predecessor in interest have been deprived by the Court and the remaining parties of an opportunity to be heard with respect to their interest. The very basis of the doctrine of *res judicata* is absent.

IV.

Cosby Jr. cannot constitutionally be bound by the decrees of the Logan County Court because there was no effective privity between him and Cosby Sr. at the time those decrees were entered.

Without "privity" between Cosby Jr. and Cosby Sr. at the time of the confirmation decree, Cosby Jr. cannot constitutionally be bound thereby, even though his interest did not vest until after suit was pending and after the decree of sale was entered. *Botsford v. O'Conner,* 57 Ill. 72 (1870).

"Privity" has been defined in terms of representation by *Van Fleet, Former Adjudication* (1895), Vol. II, Chapter XVII, Page 909, as follows:

> "In order to conclude any right, title, or interest of a person by an adjudication, it is essential that he be a party to the proceeding or be represented by one. In the latter case, he is said to be a privy."

In *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 62 L. Ed. 1215 (1918), this Court has held that mere successorship in interest is not enough to create privity but that, to be binding upon the successor the predecessor in interest must have been the owner of the title at the time of the entry of judgment, in the following language:

> "The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes *cum onere.* From this it follows that nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them. This doctrine is universally accepted . . . (citing cases)".

And it has also been held by this Court that a non-party cannot constitutionally be bound by a judgment unless the party supposed to represent him in the suit holds an iden-

tical interest and is fully capable of representing the non-party. *Hansberry v. Lee,* 311 U. S. 32, 85 L. Ed. 22 (1940). The representation must exist at the time of the judgment and, where a non-party was originally in privity with a party to a suit but the party has ceased truly to represent the non-party at the time of judgment, the rule of privity has no application and the judgment entered will not bind the non-party. *Indiana Harbor Belt RR. Co. v. Calumet,* 391 Ill. 280, 288, 63 N. E. (2d) 369, 373 (1945).

To the same effect are the many cases which hold that, where the suit is adversary and not *in rem* and the title to property involved therein has descended to non-party heirs or devisees by reason of the death of a party pending suit, the heirs or devisees are not bound by the judgment subsequently entered. *Kager v. Vickery,* 61 Kan. 342, 59 Pac. 628, (1900); *Sargeant v. Rowsey,* 89 Mo. 617, 622-623, 1 S. W. 823, 824 (1886); *Zaegel v. Kuster,* 51 Wis. 31, 38, 7 N. W. 781, 782 (1881); *Hunt v. Acre,* 28 Ala. 580, 596, 598 (1856). The theory of these cases is that, upon the death of the party in interest, all privity between him and his successors ceases and new rights arise in the successors which may not be affected by the judgment unless the successors are joined as parties and given an opportunity to be heard. This principle has been well expressed by this Court in *Green v. Watkins,* 6 Wheat. 260, 5 L. Ed. 256 (U.S. 1820) at page 260, as follows:

> "There is a material distinction between the death of parties, before judgment and after judgment, . . . in the former case, all personal actions, by the common law, abate; and it required the aid of some statute, like that of the 31st section of the Judiciary Act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. *In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to their heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as was in the life time of the party.*" (Italics supplied.)

To the same effect is the case of *Requa v. Holmes,* 16 N. Y. 193 (1857), reaffirmed 26 N. Y. 338 (1863), wherein the successors in interest of a party dying pending the former suit were allowed, in a collateral ejectment action, to avoid the former decree and sale which had been entered

in the previous partition suit many years earlier. The father of the ejectment plaintiffs had been made a defendant in the partition suit but had died prior to the order of sale. Nevertheless, the sale had been confirmed and deeds had been made to the purchaser who was the grantor of the defendant in the ejection action. In holding that the partition decree and sale were void as to the plaintiffs and could not bind their interests in any way, the court said, at page 198:

> "The general rule is, that judgments and decrees bind only parties and their privies. Samuel Requa, on his death, ceased to be a party. He was not, in any sense, a party to the decree directing the sale, and there was no privity whatever, either in estate or otherwise, between his heirs and the surviving parties. By his death the suit became equally as defective as if he had not been made a party."

In personal actions not involving successorship of title, where the court is ignorant of the party's death and has proceeded with a full hearing in which the decedent was fully represented by counsel, the lack of a living party to the judgment is a mere formal or technical defect which may be corrected by *coram nobis* or bill of review. But where, because of knowledge of the death, there has been no hearing, any privity between decedent and his successors is totally ineffective. In fact, no one has been allowed to litigate the interests of the successors. Surely arguments of public policy have no application where the court knows of the death prior to hearing and makes no provision for a hearing of any kind on the objections filed.

In any event, true privity between Cosby Jr. and Cosby Sr. was prevented in the present case by the finding of the Logan County Court that the land was held in trust under the Chappelear will, which gave Cosby Sr. a life estate only. The decree of sale specifically found that the allegations of the petition were true (R. 274), including the allegation that Mrs. Chappelear had ". . . devised and bequeathed all of her property unto (Johnston), as Trustee, on the terms and conditions in said will contained . . ." (R. 257). According to basic rules of *res judicata,* if the decree of sale is binding, it is binding in all respects and is not affected by later decisions of another court whether that other court be inferior or superior in its jurisdiction. 2 *Freeman, Judgments,* (5th ed. 1925) §§ 633, 634, pp. 1333, 1336; *Peo. v. Russell,* 283 Ill. 520, 523-4, 119 N.E. 617, 618 (1918). If a

decree is held *res judicata,* a determination therein that title is in certain persons, no matter how erroneous, will bind those who are bound by the decree. *Hopkins v. Patton,* 257 Ill. 346, 348-9, 100 N. E. 992, 993-4 (1913).

Even though a later decision of the same or another court finds the title to be in other persons, the findings of the court in the prior proceedings are, *for the purpose of that proceeding,* binding on all persons bound by or taking under the decrees therein; the rule is stated in 2 Freeman, Judgments, (5th Ed. 1925), Sec. 629 p. 1327, as follows:

> "And though an opposite result has been reached upon the same issue in independent proceedings, *the final judgment in each case must, in subsequent proceedings, be regarded as conclusive for the purposes of the proceedings in which it was rendered and to the extent of rights already enjoyed thereunder.* Thus an adjudication of widowhood in proceedings for a family allowance is not affected by a contrary finding in subsequent distribution proceedings, when the question later arises as to the right to credit for the allowance, on proceedings for settlement of the account. The first adjudication is final and conclusive of the fact of widowhood so far as it affected the granting of the allowance and the right to credit therefor. And a valid decree of divorce, in so far as it fixes the single status of the parties is not overcome by a subsequent inconsistent decree of separation with alimony."

It is clear beyond dispute that, *at the time it was entered,* the order of sale by the County Court of Logan County was completely void as to all freehold interests except the life estate in Cosby Sr., which of course terminated on his death shortly thereafter. There can be no doubt but that an ejectment suit brought by Cosby Jr., or by the holders of the fee under the will, against Harts following the sale proceedings would have been entirely successful.

Under the above authorities the privity found by the Circuit Court of Appeals to exist by reason of the decision of the Supreme Court of Illinois in the case of *Johnston v. Cosby,* 374 Ill. 407, 29 N. E. (2d) 608 (1940), seems entirely spurious. The decision in that case, rendered more than two years after the sale proceeding in Logan County, could not overrule the finding of the Logan County Court, does not purport to do so, and, in fact makes no mention whatever of the Skelton Farm or the sale proceeding. Moreover, a "privity' supposed to be established more than two

years after the proceeding in question could not possibly supply that representation of the non-parties which is required to exist at the time of judgment in order to make the judgment binding against them. *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 474-476, 62 L. Ed. 1215, 1220-1221 (1918); *Hansberry v. Lee,* 311 U. S. 32, 85 L. Ed. 22 (1940).

That there is no privity effective to bind a non-party who succeeds to the fee title by the death of a party pending suit, where the court has erroneously found that the party had only a life estate, has been squarely held in the case of *Hoffman v. Hanley,* 187 Ill. App. 551 (2d Dist. 1914). There a mortgagee proceeded in foreclosure against John Hanley and his wife. Although the defendants actually held the fee title as tenants in common, the court found Mrs. Hanley to have only a life interest, and as a result, when she died pending foreclosure, her children were not made parties to the suit. In a subsequent collateral action, the court held that her children took her equity in the land exactly as if she had never been made a party to the foreclosure proceedings. Although the foreclosure decree and sale had the effect of discharging the mortgage, it had no effect whatever on the fee interest which was actually held by the wife and to which the children succeeded. See also *Sutton v. Read,* 176 Ill. 69, 80, 82, 51 N. E. 801 (1898).

Judgments are held binding against parties only in the character of ownership in which they sue or are sued. *Phillips v. Parker,* 148 Kan. 474, 479, 480, 82 P. 2d 708, 712, 713 (1938); *Elliott v. Frakes,* 71 Ind. 412, 416 (1880), reaffirmed on second appeal, 90 Ind. 389, 393 (1881); *Hansen v. Schwartz,* 345 Ill. 609, 616, 178 N. E. 246 (1931).

A similar rule is followed in the Illinois partition cases in applying the doctrine of representation to bind persons who are not in being at the time of suit. To make certain that the interests of the unborn are properly litigated, the parties must properly set forth in the pleadings the true interests of the non-parties, in order to bind them. *Weberpals v. Jenny,* 300 Ill. 145, 156, 133 N. E. 62, 66 (1921); *Baker v. Baker,* 284 Ill. 537, 543, 120 N. E. 525, 528 (1918).

V.

The confirmation decree can not constitutionally be held to bind the interests of Cosby Jr. because Johnston knowingly failed in his fiduciary duty to join Cosby Jr. as a party and, while purporting to represent him as trustee in Johnston's own petition, suffered the decree to be entered in derogation of Cosby Jr.'s rights wtihout any contest in his behalf.

The petition for sale filed by Johnston in the Logan County Court shows that it was never intended that the sale proceedings be adversary in nature. The Illinois statute (Ill. Rev. Stat. 1937, c. 3, para. 100) specifically provided that "the widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, . . . and all persons . . . having or claiming any interest therein in possession or otherwise shall be made parties." Cosby Jr. was certainly a devisee, a minor and a person claiming an interest in the property, as were also the holders of the remainder in fee after the trust provided in the will. Yet, neither Cosby Jr. nor the holders of the remainder were made parties.

In requiring both heirs and devisees and also any person "claiming" any interest in the property to be made parties, the statute was clearly designed to require the joinder of all persons who might have an interest, regardless of the validity or extent of the interest that might later be determined to exist in such persons.

The failure of Johnston, as executor, to make Cosby Jr. and the remaindermen parties while knowing that they *might* have an interest was a "fraud in law" both on the court and on the person not joined, so as to make the decrees of the court wholly ineffective to bind the interests of the non-parties. *Hedlund v. Miner*, 395 Ill. 217, 231, 69 N.E. (2d) 862 (1946); *Walker v. Cook*, 294 Ill. 294, 298, 128 N. E. 584, 486 (1920); *Wright v. Simpson*, 200 Ill. 56, 62 65 N.E. 628, 630 (1902); *Hewitt v. Hewitt*, 17 F. (2d) 716, 717, 719 (C. C. A. 9th 1927); *Diamond v. Connolly*, 251 Fed. 234, 238, 240 (C.C.A. 9th, 1918), same case 276 Fed. 87, 91-92 (C.C.A. 9th 1921). See also *Eddy v. Eddy*, 302 Ill. 446, 452-454, 134 N.E. 801, 803, 804 (1922). The executor in such cases is acting in a fiduciary capacity and is under a duty to make full disclosure to the court of all possible interests that might be affected by the suit. These cases hold that the heir or devisee can establish his interest in a subsequent proceeding, unaffected by the prior judgment.

Instead of joining Cosby Jr. and the other interested persons as parties, Johnston undertook to represent their interests as trustee under the will at the same time that he was acting as *petitioner* in the sale proceedings. This is admitted and specifically pleaded by both Johnston and Harts in their answers. Both defendants admit that, during the course of the sale proceeding, the trust and estates created by the Chappelear will were considered valid (R. 28, 38), and that, as executor and trustee under the will, Johnston occupied a dual fiduciary position, with the duty of protecting the interests of the estate and its beneficiaries (R. 29, 39). In paragraph 11 of Harts' answer (R. 38), he says:

> "These defendants admit that during the course of the proceedings to sell the said farm, the trust created by the will of May Barrett Chappelear was considered valid and all parties believed that Percy B. Johnston as Trustee under that will held the full legal title to the farm land sold to David H. Harts, *and aver that Percy B. Johnston, as trustee, in fact acted as a petitioner in the proceedings to sell, and did so in the best interests of the Estate.*"

Thus, although he did not join himself as a party defendant, Johnston was, in effect, attempting to represent both sides of the same suit and was, as executor, suing himself as trustee. Obviously, such a procedure was purely nonadversary except as to Cosby Sr.'s supposed life estate. Where an administrator or executor brings a petition involving property in the estate, and at the same time, undertakes or purports to represent the interests of persons interested in the estate who would normally be defendants to the petition, the proceeding is a sham, a fraud and a meaningless formality, and the persons supposedly represented will not be concluded or bound by the decrees rendered therein. *McArthur v. Scott*, 113 U. S. 340, 394, 28 L. Ed. 1015 (1885); *Pfister v. Johnson*, 13 Fed. Supp. 662, 665-66 (N. D. Okla. 1936); *Fisher v. Banta*, 66 N. Y. 468, 481-82 (1876); *Swope v. Swope*, 173 Ala. 157, 164, 55 So. 418 (1911); See *People v. Feicke*, 252 Ill. 414, 420, 96 N. E. 1052 (1911); to the same effect where service of process on a minor is had by delivery of same to one having an adverse interest in the suit. *Heppe v. Szczepanski*, 209 Ill. 88, 104, 106, 70 N. E. 737 (1904); *Manternach v. Studt*, 230 Ill. 356, 361, 82 N. E. 829 (1907).

The case of *Pfister v. Johnson*, 13 Fed. Supp. 662, 665-

666 (N.D. Okla. 1936), is closely similar to the present case on this point. In that case the plaintiff brought an action in equity to cancel conveyances which had been made pursuant to an administrator's sale to pay debts and for an accounting. In a previous proceeding in the county court to sell real estate to pay debts of the plaintiff's deceased mother, the administrator, purportedly acting also as plaintiff's guardian, had filed a purported waiver of the heirs of said decedent and consent to the order of sale. In his petition the administrator had failed to state the homestead interest of the decedent and of the plaintiff. Against the contention of the defendant purchaser that the decree of sale of the county court constituted an adjudication that the land was not a homestead and that this adjudication was binding on the plaintiff, the court held that the action of the administrator in attempting to represent the plaintiff as guardian and to waive notice of the hearing and consent that the decree of sale be entered, constituted such a gross fraud upon the rights of the plaintiff ". . . as a matter of law . . ." that the proceedings were not adversary and the decree therein could not be held to bind the plaintiff's interest.

The conduct of an administrator or executor in suffering a decree to be entered in derogation of the rights of non-parties without any contest in their behalf, at the same time that he is purporting to represent them, is directly in fraud of the rights of the non-parties. Under such circumstances the judgment so entered is, as to such non-parties, totally void and subject to "collateral attack" by them. *Restatement, Judgments* (1942) § 91, pp. 450 et seq. As there stated, at page 451:

> "This result is necessary since such persons are not parties to the action and may have no notice of it, or if they do have notice they may not be able to intervene for the protection of their interest. The fact that such persons have a right to direct attack upon the judgment through equitable relief, (see Sections 112-130) does not prevent them from also having the right to disregard the judgment and to proceed directly against persons who have acquired the property as a result of the judgment as if no such judgment had been rendered."

Where the non-party, whose interests the fiduciary is purporting to represent, is a transferee of the property by death of a party pending suit, the rules of privity and *lis*

pendens have no application and the non-party is not bound in any way by the judgment; the purchaser at the sale, who obtains title to the property under the judgment acquires no real interest in the property but must hold it in constructive trust for the defrauded non-party. *Restatement, Judgments* (1942) § 91, Comment e, p. 454.

It is plainly apparent in the present case that the sale proceeding was almost entirely non-adversary in its origin and became purely non-adversary on the death of Cosby Sr., as a result of the conduct of Johnston. First he failed to join as parties Cosby Jr. and other supposed owners of the title and undertook to represent those interests himself. After the sale Johnston was on the spot. Harts had bought at a low price - - far lower than Johnston expected - - and Harts was his brother-in-law, with whom he was quite close and friendly. If he had been an independent trustee and not acting as petitioner in the suit, he would clearly have felt called upon to object to the sale. In this predicament, obviously to save himself embarrassment by having to take sides either for or against Harts or for or against the interests of his beneficiaries under the trust, Johnston refused to sign an adversary report of sale and submitted a report that was entirely non-committal, suggesting that there were other persons who would file objections and that he therefore did not make a request for either confirmation or rejection. Cosby Sr.'s objections caused the proceeding to become adversary until he died on July 21, when once again Johnston was in the position of the sole real party to the suit in conflicting dual fiduciary capacities. Yet he made no objections on behalf of his beneficiaries and made no effort to alter his report of sale. Nor did he make any effort to join the plaintiffs as parties, or advise them that they should intervene, or inform them that they should have independent representation and counsel, or do *anything* to assure them an opportunity to be heard in a fair and adversary trial of their interests. He did not even inform the plaintiffs that the objections filed by Cosby Sr. remained undisposed of at the time of his death (R. 141).

On the day of the hearing he did not appear, and his attorney, Mills, (whose name and address appeared on the cover of Cosby Sr.'s objections) stood silently by while the court overruled the objections and entered the order of confirmation without any trial whatever. As alleged in the complaint and admitted by Johnston on the trial of

this case, Johnston put both of the plaintiffs on the train for California just three days before August 2nd, the date set for the hearing on Cosby Sr.'s objections, thus insuring absolutely that plaintiffs would not be present at the hearing and would not be represented by any one therein who might urge objections to the sale. That there was no serious attempt made to conduct a true adversary proceeding is demonstrated in this case beyond dispute, and the decrees entered in such a proceeding cannot constitutionally bind persons who were not parties.

VI.

Even if the decrees of the Logan County Court were, in any respect, valid against the interest of Cosby Jr., he is entiled to equitable relief from those decrees against Harts who bought at the sale with full notice and knowledge of the defects in the sale proceeding.

It cannot be denied that Cosby Jr. was, without his fault, deprived of a hearing in the sale proceeding in the Logan County Court. Nor can it be denied that Harts knew or had notice that Cosby Jr. was a person "having or claiming an interest" in the premises sold and was not made a party. He had full notice thereof on the record and admits in his answer that he believed the interests under the will to be valid (R. 38). Through conversations with Johnston, Harts was in constant contact with the sale proceeding throughout its course (R. 162, 166-170). He knew that Cosby Sr. died prior to the day set for hearing the objections (R. 169). Harts realized that the sale proceeding was defective and, shortly after he obtained his deed, paid for the assignment of the mortgage on the farm, but had the mortgage assigned to a nephew of his wife and Johnston ". . . to keep the lien alive . . ." and thus, at least, to be ". . . secured to the extent of the mortgage . . ." in case the sale was held invalid. (R. 175, 176). Now he is trying to keep the title by imposing a "privity" on Cosby Jr. by reason of the decision two years later in *Johnston v. Cosby*, 374 Ill. 407, 29 N.E. 608 (1940), to which suit he was not even a party. His position amounts merely to a claim of "title by accident."

Cosby Jr. is not guilty of *laches* in bringing his suit to redeem and recover the land. He was a minor, fifteen years of age, at the time of the sale proceeding, and he brought the present suit in May of 1944, approximately six months after he became of age in November of 1943.

There is a long line of decisions in the Illinois courts establishing the rule that infants are entitled to the special protection of a court of equity and will be allowed, even where they were made parties to the prior proceeding, to establish their rights of which they have been erroneously deprived, by an original bill in equity against a purchaser who took with knowledge or notice of the errors. *Loyd v. Malone*, 23 Ill. 41, 43, 44 (1859); *McReynolds v. Miller*, 372 Ill. 151, 153-154, 22 N. E. (2d) 951, 952 (1939); *Denk v. Fiel*, 249 Ill. 424, 431, 94 N. E. 672, 675 (1911).

The federal courts of equity are constitutionally bound to give no less equitable relief than that to which the plaintiff would be entitled in the state courts, when petitioned so to do by a party of diverse citizenship. Point I, page 14, of this brief.

Respectfully submitted,

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Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 524

MARK BARRETT COSBY,

Petitioner

v.

DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,

Respondents

REPLY BRIEF OF PETITIONER

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INDEX

Page

Argument

I. Cosby Sr. was not divested of title by the order of sale; he and Cosby Jr. were entitled to a true judicial hearing on objections... 1, 2

II. The County Court's jurisdiction over Cosby Sr. until his death did not empower the Court to render a decree which would bind Cosby Jr. 2–6

III. Cosby Jr.'s supposed right to re-open the sale proceeding in the County Court of Logan County after he reached his majority does not furnish that due process required to make valid the decrees of sale and confirmation 6, 7

IV. The decrees of the Logan County Court, which were ineffective to bind the interest of Cosby Jr. because of lack of due process, could not be validated by any due process in the present suit 7–9

Conclusion 10

List of Authorities Relied Upon

Brown v. Fletcher's Estate, 210 U.S. 82, 52 L. Ed. 966 (1908) 3

Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L. Ed. 1027 (1915) 8

Gibson v. Roll, 27 Ill. 88 (1862)..... 4

Griffin v. Griffin, 327 U.S. 220, 90 L. Ed. 635 (1945).. 6

Harris v. Chicago Title & Trust Co., 338 Ill. 245, 170 N.E. 285 (1930) 3

Hoffman v. Hanley, 187 Ill. App. 551 (2d Dist. 1914). 3

Hopkins v. Curtis, 43 R.I. 19, 109 Atl. 711 (1920)... 3

LeMoyne v. Harding, 132 Ill. 23, 23 N.E. 414 (1890).. 1

Londoner v. Denver, 210 U.S. 373, 52 L. Ed. 1103 (1908) 2

Mitchell v. Banking Corp. of Mont. 94 Mont. 183, 22 P. (2d) 155 (1933)..... 8

Page

Odell v. Levy, 307 Ill. 277, 138 N.E. 608 (1923)..... 7

Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1878). 7

Pfister v. Johnson, 13 Fed. Supp. 662 (N.D. Okla. 1936) 4

Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72 (U.S. 1874) 8

Retzinger v. Retzinger, 337 Ill. 378, 169 N.E. 176 (1929) 1, 9

Riverside Mills v. Menefee, 237 U.S. 189, 59 L. Ed. 910 (1915) 7

Rives v. Stanford, 188 Okla. 108, 106 P. (2d) 1101 (1940) 3

U. S. v. Walker, 109 U. S. 258, 27 L. Ed. 927 (1883).. 3

Verdun v. Barr, 253 Ill. 120, 97 N.E. 239 (1912)..... 2

Windsor v. McVeigh, 93 U.S. 274, 23 L. Ed. 914 (1876) 2

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REPLY BRIEF OF PETITIONER

I.

Cosby Sr. was not divested of title by the order of sale; he and Cosby Jr. were entitled to a true judicial hearing on objections.

The assertions in respondents' brief under Point A that Cosby Sr. was divested of title to the land to be sold by the decree of sale on June 6, 1938, and that Cosby Sr. had no inheritable right in the land thereafter, but only a "mere privilege of objection," are entirely unsupported in law and directly contrary to the numerous authorities cited at Point II, page 16, of petitioner's brief. We particularly call attention to *LeMoyne v. Harding*, 132 Ill. 23, 23 N.E. 414 (1890); *Retzinger v. Retzinger*, 337 Ill. 378,

169 N.E. 176 (1929). The very quotation from *Ehrgott v. Seaborn*, 363 Ill. 292, 295 (1936) relied upon by respondents makes three references to the "*judicial discretion*" required of the Court in passing on a sale. The *Ehrgott* case does not hold that a court may approve a sale on its own motion or over objections of the holders of the title without a hearing. In that case the court had held a proper hearing on the report of sale and the objections filed, and there was no question but that the trial court had proceeded in a proper judicial manner. The kind of "administrative" discretion contended for by respondents (their brief, page 30) is directly contrary to the wording of the statute itself which requires a regular judicial hearing on the report and objections filed.

Any additional notice necessary to give Cosby Jr. an opportunity to be heard on objections in a proper judicial hearing is not only proper under the statute (*Verdun v. Barr*, 253 Ill. 120, 127, 97 N.E. 239 (1912)) but must be impliedly authorized and required by the statute in order to make the statute itself constitutional. (*Londoner v. Denver*, 210 U.S. 373, 52 L. Ed. 1103 (1908)).

II.

The County Court's jurisdiction over Cosby Sr. until his death did not empower the Court to render a decree which would bind Cosby Jr. without notice and hearing.

Respondents have wholly failed to answer Point III, pages 17-24, of petitioner's brief. They have failed to cite any case holding that a court can constitutionally enter judgment over objections filed and pending where the court knows that the predecessor in interest is dead, without giving the successors notice and an opportunity to protect their rights. Instead, respondents argue that the County Court did not lose "jurisdiction" of the cause merely on account of the death of Cosby Sr., and cite the case of *Claflin v. Dunne*, 129 Ill. 241, 21 N.E. 834 (1889), and other authorities in support of that rule. That argument and those authorities had no application to the present case. It is not the death of Cosby Sr., but rather the failure of the Court to provide a hearing on objections while knowing of Cosby Sr.'s death, that is most significant in the present case. The possession of "jurisdiction" by a court does not authorize it to act arbitrarily or without regular judicial procedure in arriving at its determination. *Windsor v. McVeigh*, 93 U.S. 274, 25 L. Ed. 914

(1876); *U. S. v. Walker*, 109 U.S. 258, 27 L. Ed. 927 (1883). And its knowledge that the predecessor in interest has died requires it, in due process, to give the successor an opportunity to be heard before it can validly cut off his rights. *Brown v. Fletcher's Estate*, 210 U.S. 82, 52 L. Ed. 966 (1908); *Hopkins v. Curtis*, 43 R. I. 19, 21, 109 Atl. 711, 712 (1920); *Harris v. Chicago Title & Trust Co.*, 338 Ill. 245, 266, 170 N.E. 285, 294 (1930).

Far from holding contrary to the above authorities, the opinions in *Claflin v. Dunne*, 129 Ill. 241, 21 N.E. 834 (1889) and similar Illinois cases, carefully distinguish the situation there before the Court from cases in which the Court knows of the predecessor's death and there has been no hearing or trial. In the *Claflin* case the Court was careful, on page 245 of its opinion, to limit the question there at issue to ". . . whether, after the filing of the plea, the death of Claflin, *without notice of death being brought to the attention of the Court, deprived the Court of jurisdiction to render a judgment in the cause.*" The same limitation of the issue appears in *Danforth v. Danforth*, 111 Ill. 236 (1884). In both of those cases, relied upon by respondents, the Court had not known of the death of the party and had proceeded with a full and fair trial of the issues involved, at which the decedent had been fully represented by counsel.

In addition to the foregoing, the above cases relied upon by respondents are not in point because they involve actions in *assumpsit* and the like, and have nothing whatever to do with the effect of a judgment, in a proceeding to sell real estate, on the title of non-parties who have succeeded to the title on the death of a party before judgment and before hearing. In proceedings to sell real estate, where such proceedings are adversary in nature and are not *in rem*, it has been uniformly held that non-parties who have succeeded to the title on the death of a party before judgment are not bound by the judgment. *Rives v. Stanford*, 188 Okla. 108, 109, 106 P. (2d) 1101, 1103 (1940); *Hoffman v. Hanley*, 187 Ill. App. 551 (2d Dist. 1914); and cases cited under Point IV, page 25, of petitioner's brief. At page 26 of their brief, respondents seem to admit the validity of the cases cited by petitioner and the rule thereof; nevertheless, respondents at page 18 of their brief cite other cases in support of their position. All of the cases cited by respondents are readily distinguishable from the case at bar. In none of them

were objections or pleadings on file which were denied judicial hearing by the Court. That distinction alone renders them unavailing to respondents as an answer to Point III of petitioner's brief. The case of *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604 (1861), was not even adversary, but was a summary proceeding had by the guardian or conservator for the benefit of his incompetent ward. In such cases everything done by the guardian is presumed by law to be for the ward's benefit and jurisdiction of the court over the guardian and the property is all that is required. That type of case in Illinois has been expressly distinguished from proceedings to sell real estate to pay debts of a decedent, which are expressly held to be adversary in their nature. *Gibson v. Roll*, 27 Ill. 88, 90 (1862); see Point II, p. 15 of petitioner's brief. The same distinction is made in *Pfister v. Johnson*, 13 Fed. Supp. 662, 665 (N.D. Okla. 1936).

Defendants' other cases, *Palmerton v. Hoop*, 131 Ind. 23, 30 N.E. 874 (1892); *McCormick v. Paddock*, 20 Neb. 486, 30 N.W. 602 (1886); *Shea v. Shea*, 154 Mo. 599, 55 S.W. 869 (1900); *Pugh v. McCue*, 86 Va. 475, 10 S.E. 715 (1890), are actions *in rem* and involve the validity of default judgments against persons over whom jurisdiction had been acquired, either by name or as "unknown owners," under applicable publication statutes. They have no bearing whatever on proceedings to sell real estate to pay debts of a decedent in Illinois, which have uniformly been held to be actions *inter partes* requiring personal service of summons and personal jurisdiction of the title holders. (Point II, p. 15, petitioner's brief and cases there cited.)

The defendants rely heavily on the case of *Palmerton v. Hoop*, 131 Ind. 23, 30 N.E. 874 (1892). That case is readily distinguishable from the case at bar in several vital respects. The father of the plaintiffs in that case was the administrator petitioning for the sale and at the time of his death there were no objections of any kind pending before the court. Under the Indiana statute then in force governing sales of real estate of decedents to pay debts (*Ind. Rev. Stat.* (1876) pp. 519-532, sec. 75-102 of c. 2 of Part Fourth) such actions were purely *in rem*, and were wholly summary in character. There was no requirement that any persons be made parties either by name or otherwise and the action was begun by filing a petition and publishing notice of the time and place of hearing such pe-

tition. (Sec. 75, p. 521.) There were no parties to the proceedings as such and, assuming a proper publication of the notice of the petition, the court's orders were binding against every one. Under sec. 100 of the same statute (p. 531) no hearing whatever was required on the confirmation by the court and no provision was made for filing objections to the report of sale. Proceedings under the Illinois statute are entirely different in their nature, requiring jurisdiction of the court over the title holders personally and individually and requiring adversary trial of issues. The question whether the Indiana statute authorized the taking of plaintiffs' property without due process of law was never raised in the *Palmerton* case.

Respondents have not answered Points IV and V, pages 24-33, of petitioner's brief, except to assert that any rights of Cosby Jr. "were purely derivative" from Cosby Sr. As shown above, in adversary proceedings to sell real estate, non-party successors of a titleholder who dies before judgment are uniformly held not to be in such privity with their predecessor as will cause them to be bound by the decree.

Nor do respondents make any argument or cite any authority to show how Cosby Jr. could be bound by a "privity" based on the decision in *Johnston v. Cosby*, 374 Ill. 407, 29 N.E. (2d) 608 (1940), rendered more than two years after the sale proceeding in Logan County, when such "privity" could not exist under the express finding of the Logan County Court in its decree of sale. Although respondents argue that the decree of sale is "unimpeached and unimpeachable," their claim that Cosby Jr. was bound by "privity" is based on the assumption that the determination of interests under that decree of sale was impeached or over-ruled, by the later case of *Johnston v. Cosby*. They do not and cannot dispute that, *at the time it was entered*, the order of sale was completely void as to all freehold interest except the life estate in Cosby Sr., which terminated on his death shortly thereafter or that an ejectment suit brought by Cosby Jr. against Harts immediately following the sale proceeding would necessarily have been successful.

Nor do respondents attempt to show how a "privity" based on a decision rendered long after the sale proceeding, can afford Cosby Jr. that representation in the sale proceeding to which he was constitutionally entitled before being bound by the decrees of the Logan County Court.

Respondents make no answer of any kind to Point V, pages 29-33, of petitioner's brief, and we submit that, on this point alone, the decrees of the Logan County Court are entirely ineffective to bind the interest of Cosby Jr. in the land, and Cosby Jr. is entitled to disregard those decrees and in this suit have Harts held to be a constructive trustee of the property for the benefit of Cosby Jr.

III.

Cosby Jr.'s supposed right to re-open the sale proceeding in the County Court of Logan County after he reached his majority does not furnish that due process required to make valid the decrees of sale and confirmation.

Respondents take the position that the requirements of due process are satisfied by the rule in Illinois that a minor can re-open a proceeding in the court where the judgment was rendered, after he attains his majority. At the same time, they insist that the minor could not, after re-opening, prevail against a *bona fide* purchaser. This Court has held such an argument to be wholly fallacious in the case of *Griffin v. Griffin*, 327 U.S. 220, 90 L. Ed. 635 (1945). In that case the wife had obtained a judgment for accrued alimony without giving the husband any notice or opportunity to be heard and had filed suit on the judgment in another jurisdiction. It was argued on behalf of the wife that, because the New York practice allowed such a judgment to be set aside upon a subsequent showing of defenses by the husband, the judgment did not deprive him of any right and was therefore not wanting in due process. This Court denied that contention and held that "Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights." (Page 231), and said:

> "If New York, by its practice, recognizes the ineffectiveness of such a judgment, that could not be made a ground for giving the judgment effect elsewhere more than any other judgment rendered without notice. It might as well be said that any judgment which does not validly cut off defenses because rendered without due process may be made the basis of suit elsewhere subject to those defenses. To the extent that New York refuses, if it does refuse, to set aside the judgment of 1938 unless there be some affirmative showing that there was a meritorious substantive defense to its entry, there is an assertion of power in

the court to enter a money judgment and issue execution upon it without notice." (Page 231.)

It is clear from the above decision of this Court that neither the supposed right of the minor to re-open the sale proceeding, nor the right of Cosby Jr. to have the decrees of the Logan County Court set aside in a *coram nobis* or similar proceeding in the County Court (supposed to exist by the Circuit Court of Appeals, in its opinion, R. 436) furnishes that due process to which Cosby Jr. was entitled before a final judgment was rendered by the County Court in the sale proceeding.

IV.

The decrees of the Logan County Court, which were ineffective to bind the interest of Cosby Jr. because of lack of due process, could not be validated by any due process in the present suit.

Respondents argue in Point C of their brief that the trial in the district court on the issue of fraud in the sale, has afforded Cosby Jr. due process sufficient to validate the former decrees of the County Court of Logan County. No authorities are cited by respondents to the point. The argument is directly contrary to the decisions of this and other courts. When, as in the present case, the former decrees were, when rendered, wholly ineffective to bind the interest of a person not made a party, no supplementary or later proceeding in any court can make such decrees effective against such person. *Pennoyer v. Neff*, 95 U.S. 714, 728, 24 L. Ed. 565 (1878); *Riverside Mills v. Menefee*, 237 U.S. 189, 195-97, 59 L. Ed. 910 (1915); *Odell v. Levy*, 307 Ill. 277, 280-82, 138 N.E. 608 (1923). As stated by this Court in *Pennoyer v. Neff*, at page 728:

> "The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. . . . This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

In *Odell v. Levy*, 307 Ill. 277, 280-82, 138 N.E. 608 (1923), a mortgagee obtained a decree of foreclosure and sale of certain property under a mistake as to who were the rightful owners, without joining the true owners as parties.

After the sale had been approved by the court the mortgagee and the purchaser filed a supplemental bill against the true owners setting up the mistake, and praying that their interests be subjected to the foreclosure and period of redemption under the original decree. The lower court granted the prayer but the Supreme Court reversed saying, in 307 Ill. at p. 280:

> "The decree of foreclosure as to the plaintiffs in error was void. They were not parties to it. They were the equitable owners of the equity of redemption, and it is well settled that a decree of foreclosure in a proceeding to which the person having the equity of redemption is not a party is a nullity as to him. (Rodman v. Quick, 211 Ill. 546.) There was no authority for making them parties to the decree of foreclosure and binding them by the sale made under it by means of a supplemental bill. *Since the decree was void as to them, the court could not in any kind of a proceeding give it any validity against them.* Their land was subject to the mortgage debt in accordance with the terms of the mortgage, which could be enforced against them only in accordance with the usual and ordinary process of foreclosure. A decree to which they were not parties was not even *prima facie* evidence against them of anything and they could not through any proceeding be bound by its terms." (Emphasis supplied.)

To Cosby Jr., who brought this suit to protest against the taking of his property without due process of law, it is no answer to say that in his case due process would have led to the same result. *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424, 59 L. Ed. 1027 (1915); *Rees v. Watertown,* 19 Wall. 107, 123, 22 L. Ed. 72 (U. S. 1874); *Mitchell v. Banking Corp. of Mont.,* 94 Mont. 183, 187, 22 Pac. (2d) 155 (1933). The present suit was brought for the very purpose of contesting the validity of the decrees of the County Court against Cosby Jr. Proceedings to sell real estate to pay debts are purely statutory in Illinois and the federal district court has no jurisdiction to make either an order of sale or an order of confirmation under the statute.

Even if Cosby Jr. could lawfully be bound by a subsequent validation of the sale proceeding, he must first be given the opportunity to redeem the land from the sale. Cosby Jr. made a formal offer to Harts, prior to filing suit,

to redeem the land by reimbursing him his expenditures (R. 14, 318-21) which offer was refused by Harts (R. 42). Also in their complaint, plaintiffs stated that they were ready and willing to pay Harts, as a condition to the conveyance of said farm to them, such amount as the court shall decree necessary to do equity in the premises.

Under well established law in Illinois, Cosby Jr. holds the title to a two-thirds interest in the land until a confirmation of sale has been entered which is valid against him. See Point II, page 16, of petitioner's brief. Until that time, Cosby Jr. has not only the title but also has the right to redeem the land. Regardless of whether the sale is one which merits confirmation, where a confirmation decree has been improperly entered without giving the heir an opportunity to redeem, the confirmation must be set aside to give the heir such opportunity. *Retzinger v. Retzinger,* 337 Ill. 378, 169 N. E. 176 (1929). Thus Cosby Jr. has a right of redemption for which he is entitled to constitutional protection; having offered, both before suit and in his complaint, to redeem, he could not lawfully be bound by any subsequent confirmation in any court.

CONCLUSION

Cosby Jr., who was not made a party in the County Court, has been completely deprived of his property to which he is entitled under the fundamental rule of *res judicata* and due process established and re-established without contradiction by cases in all jurisdictions as a basic principle of American and English jurisprudence, which rule is that a prior judgment cannot lawfully or constitutionally be conclusive and binding as to any person who has had no opportunity to litigate, in a court of competent jurisdiction, in adversary proceedings, the matters on which the judgment is founded. Defendants have completely failed to answer this argument of petitioner or show that this fundamental rule is not determinative of this case.

Correct and constitutional application of the principles of *res judicata* and due process to this case can result only in a decision that Cosby Jr. is entitled to his two-thirds interest in the land unaffected by the decrees of the Logan County Court, together with the rents, issues and profits therefrom, upon making such reimbursement to Harts as the Court may deem equitable in the premises.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 524

MARK BARNETT COREY,

Petitioner,

vs.

DAVID E. HARTS, FLORENCE J. HARTS and PERCY E. JOHNSTON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX

PAGE

Summary Statement of Facts 1

Questions Presented 4

Reasons Relied on for Denial of Writ 6

Opinion of the Court Below 6

Summary of Argument 7

The Petition should be denied for three reasons, each sufficient in itself:

1. The County Court of Logan County had jurisdiction to enter the order of confirmation of the sale under the settled law of Illinois and in the absence of fraud due process requires that that order be sustained rather than that it be subject to collateral attack 7-21

2. Additionally, Petitioner upon becoming of age having declined to avail himself of the opportunities to reopen the case in the County Court provided by the law of Illinois has no claim of lack of due process 22-23

3. Additionally, having been defeated on the charges of fact made by him in a full trial on the merits in the District Court of the United States (notwithstanding he had no right to such trial) petitioner has had his day in Court and was not denied due process by the Federal Courts 23-30

Conclusion 30

Appendix 33-38

List of Authorities Relied Upon.

Anderson National Bank v. Luckett, 321 U. S. 233, 242 (1943) 88 L. Ed. 692, 702 ..... 21, 23

Bunker v. Green (1868), 48 Ill. 243, 245 19

Citizens Securities and Investment Co. v. Dennis (1925), 236 Ill. App. 307, 309-310, 311-312 19

Claflin v. Dunne (1889), 129 Ill. 241 17

Comstock v. Crawford (1866), 3 Wall. 396, 404, 18 L. Ed. 34 15

Denk v. Fiel (1911), 249 Ill. 424 on 430 22

Ehrgott v. Seaborn (1936), 363 Ill. 292 ..... 11, 24

Gaytime Frock v. Liberty Mutual Insurance Company (C.C.A. 7th, 1945), 148 Fed. (2nd) 694 24

Harvey, Guardian of the Heirs of Sweet, 16 Ill. 127 20

Johnston v. Cosby, 374 Ill. 407 10

Knapp v. United States (C.C.A. 7th, 1940), 110 Fed. (2nd) 420 on 422 24

Knott v. Taylor (1888), 99 N. C. 511, 6 S. E. 788 18

Kretsinger v. Brown (C.C.A. 8th, 1908), 165 Fed. 612, 615 15-16

Linn v. Brecher (1899), 90 Ill. App. 6, 8 20

McCampbell v. Warrich Corporation (C.C.A. 7th, 1940), 109 Fed. (2nd) 115, 118 18

McCormick v. Paddock (1886), 20 Neb. 486, 30 N. W. 602 18

McIntosh v. Wiggins (C.C.A. 8th, 1941), 123 Fed. (2nd) 316 on 321 24
Mitchell v. Overman (1881), 103 U. S. 62, 26 L. Ed. 370 20
Montgomery v. Equitable Life Assurance Society (C.C.A. 7th, 1936), 83 Fed. (2nd) 758, on 760-1 ..... 14, 21
Montgomery v. Gilbert (C.C.A. 9th, 1935), 77 Fed. (2nd) 39 on 42 15
Palmerton v. Hoop (1892), 131 Ind. 23, 30 N. E. 874 18
Pugh v. McCue (1890), 86 Va. 475, 10 S. E. 715 18
Re 620 Church St. Building Corp., 299 U. S. 24, 27, 81 L. Ed. 16, 19 21
Shea v. Shea (1900), 154 Mo. 599, 55 S. W. 869 18
Simmons v. Saul, 138 U. S. 439 (1890), 34 L. Ed. 1054 15
Streeter v. Chicago Title & Trust Co. (D.C. N.D. Ill. 1926), 14 Fed. (2nd) 331 16
Yople v. Titus (1861), 41 Pa. St. 195, 80 Am. Sec. 604 18

TEXTS.

1 Black on Judgments (2nd Ed.) pp. 188-189, Sec. 128, also p. 294, Sec. 200 ..... 19, 20
1 Freeman on Judgments (5th Ed.) pp. 226-7, Sec. 123, also p. 885, Sec. 406 ..... 19, 20
Restatement of the Law of Judgments, pp. 350-1, Sec. 78b 19

STATUTES.

Illinois Revised Statutes, Bar Ass'n Ed., 1937, Ch. 3, Pars. 100-111, inclusive, and 132 ..... 8, 29-31

IN THE

SUPREME COURT OF THE UNITED STATES

No. 524

MARK BARRETT COSBY,
Petitioner,

vs.

DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Summary Statement of the Matter Involved.

The County Court of Logan County, Illinois on petition of the executor of the estate of May Barrett Chappelear having all necessary parties before it and having jurisdiction of the subject matter, ordered a sale to pay debts of the estate in accordance with the Illinois Statute.

Mark Barrett Cosby, Sr., sole heir and sole owner of the real estate (Finding 6 Pr. Rec. 415) entered his appearance in the proceeding to sell to pay debts. (Pr. Rec. 269-70).

There was an actual deficiency in the personal assets of May Barrett Chappelear estimated to be $14,932.70 (Pr. Rec. 260) and Mark Barrett Cosby, Sr. was fully

advised of the condition of the estate (Pr. Rec. 416, Par. 9).

The significant dates in the proceedings in the County Court of Logan County are:

Entry of Appearance of Mark Barrett Cosby, Sr. (Pr. Rec. 270)	May 19, 1938
Decree defaulting Mark Barrett Cosby, Sr. and ordering sale of the land described (Pr. Rec. 273)	June 6, 1938
Sale of defendant David H. Harts (Pr. Rec. 276)	July 2, 1938
Report of sale filed (Pr. Rec. 278)	July 6, 1938
Objections to sale filed by Mark Barrett Cosby, Sr. (Pr. Rec. 280)	July 16, 1938
Hearing on Report of sale, after fifteen days for filing objections, resulting in continuing same to Aug. 2, 1938 (Pr. Rec. 281)	July 18, 1938
Death of Mark Barrett Cosby, Sr.	July 21, 1938
Order of confirmation of Sale (Pr. Rec. 282)	Aug. 2, 1938

No attack has ever been made upon the decree for sale. The sale was necessary. All necessary parties were before the Court. None of the parties to this suit ever had a right to question the decree for sale.

As to the manner of conduct of the sale the District Court, supported by ample evidence, made the following conclusive finding.

"16

"The described land was fairly sold. The price at which it sold to David H. Harts was fair. Competent, timely and energetic effort was made on behalf of the estate to obtain the best possible price for the land by the executor and his representative, the auctioneer. *The defendant David H. Harts bid*

> *in good faith,* against the world, and paid for the land described *as a purchaser in good faith relying on the decrees of the Logan County Court.* David H. Harts thereby obtained whatever title to the described land was owned by May Barrett Chappelear at the time of his death." (Italics ours.) (Pr. Rec. 417.)

Petitioner, Mark Barrett Cosby, Jr., and his mother filed this suit in the District Court of the United States alleging that they were necessary parties to the proceedings in the Logan County Court at the time of entry of the order of confirmation of the sale.

The District Court of the United States withheld ruling on the defense that the suit was a collateral attack and heard the entire complaint on the merits, including the charges of fraud and conspiracy.

Petitioner who became 21 years of age November 23, 1943 (Pr. Rec. 72) and filed his complaint herein, May 22, 1944, was fully advised of his right to make a direct attack on the decree of the County Court of Logan County. The District Court found:

> "10.
>
> "The plaintiff, Mark Barrett Cosby, Jr., having full right to reopen the proceedings for sale in the County Court of Logan County, Illinois for all purposes and matters here urged by him, until November 1945, and that fact being urged in pleadings in this cause for more than one year, this Court should not act on his complaint to destroy the decrees of the said County Court" (Pr. Rec. 420).

Petitioner's rights are solely derivative from Mark Barrett Cosby, Sr. (Finding 7; Pr. Rec. 415).

The District Court, after full hearing, supported by ample evidence, found that the charges of fraud, conspiracy, hindering of bidders and inadequacy of price were

groundless (Pr. Rec. 247 and Findings 11, 12, 15, 16 and 17, Pr. Rec. 416, 417). The District Court said in part (Pr. Rec. 247):

> "The bill charges there was conspiracy, I think between Johnston and Harts, and there is no evidence upon which I can properly find that there was any conspiracy between them * * *. But the charge of fraud, inadequacy of consideration are not substantiated by the proof".

The Circuit Court of Appeals found that the record amply justified the findings of the District Court (Pr. Rec. 438).

Questions Presented.

The various "questions" stated by petitioner on pp. 7-8 of the petition all point to the question whether the petitioner has been deprived of property without due process of law.

The questions as presented in the petition are somewhat defective in that they ignore several important aspects of the case:

1. The law of Illinois offered petitioner an "opportunity to be heard" which he rejected.

2. Petitioner's right to an "opportunity to be heard" was satisfied by the full hearing and trial on the merits given by the District Court of the United States.

3. The unquestionably correct decree for sale entered with all necessary parties alive and before the court was followed exactly and a fair sale resulted.

The questions before this Court might therefore be more accurately stated:

1. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court that the County Court of Logan County, Illinois, having full jurisdiction of all necessary parties and of

the subject matter of a proceeding to sell real estate to pay the debts of the decedent, and having such jurisdiction at the time such matter first comes on for confirmation of the sale, all time for objecting thereto having expired, *cannot thereafter* so completely lose jurisdiction by reason of the death of the defendant so as to subject its subsequent order of confirmation to collateral attack by persons, who, prior to the death of such defendant were not proper parties, and had no right to be heard in the matter, in view of the settled law of Illinois that death of a defendant in such cases does not deprive the court of jurisdiction, there being no evidence whatever of fraud, constitutes a deprivation of property without due process of law or other denial of due process of law.

2. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court that a minor having, under the law of Illinois, the full right to reopen the sale proceedings in the County Court of Logan County, Illinois for all purposes and matters here urged by him until November 1945 and that fact having been urged in the pleadings in this cause for more than one year, was not entitled to have the District Court of the United States act on his complaint to destroy those decrees, constituted a deprivation of property without due process of law or other denial of due process of law.

3. Whether the petitioner having had his day in court, in the District Court of the United States on all issues which he could have presented anywhere, to-wit adequacy of sale price, fraud, and conspiracy and the United States District Court having decided all such issues against him can now be said to have been denied due process of law or to have been deprived of property without due process of law?

Reasons Relied on for Denial of the Writ.

The principle laid down by this court and followed in analogous cases is that jurisdiction of subject matter and necessary parties having once attached is not lost by subsequent irregularities so as to subject proceedings to collateral attack, and entry of a decree after death of a party where the matter was ripe for decision in his lifetime without bringing in additional parties is a mere irregularity.

The foregoing is the law of Illinois.

This petitioner declined to avail himself of the opportunity to be heard provided for minors by the law of Illinois.

This petitioner's opportunity to be heard has been satisfied by the full hearing on the merits given by the District Court of the United States and affirmed by the Circuit Court of Appeals.

Petitioner complains only of technical rights. The conclusive findings of fairness of sale show that no substantive rights are involved.

A purchaser in good faith at a judicial sale has a right not to be deprived of his property without due process of law.

Opinion of the Court Below.

The Opinion of the United States Circuit Court of Appeals for the 7th Circuit which respondents assert reaches an unquestionably correct result appears on pages 431 to 438 of the printed transcript of the record and is reported in 169 F. 2nd at pp. 689-694.

ARGUMENT.

Summary of Argument.

A.

The entry of the decree of confirmation of the sale by the County Court of Logan County after the death of Mark Barrett Cosby, Sr., the said Mark Barrett Cosby, Sr., having been alive at the time of decree for sale, during the sale, and until after time for filing objections had passed and having been alive at the time the sale first came on for confirmation, was a mere irregularity at most, and the only means provided for attack upon this irregularity is a direct attack. There was no "right" in this petitioner to be heard. This order being absolutely correct in the first instance would have to be entered if the proceedings were reopened. In such case an order *nunc pro tunc* would have been the proper procedure.

B.

In respect to the petitioner who was a minor the law of Illinois offered a full opportunity to reopen the proceedings in the County Court of Logan County until more than a year after the present suit was filed and this fact was urged on the petitioner by the pleadings in this suit.

C.

Petitioner's right to an opportunity to be heard was satisfied by the full trial given by the District Court of the United States.

Point A.

The decree of confirmation was within the jurisdiction of the County Court of Logan County, Illinois, should have been entered, and petitioner had no "right" to be heard thereon. It is therefore not subject to collateral attack in the absence of fraud. Failure to make petitioner a party at this stage of the proceeding was not a denial of due process of law and there has been no deprivation of property.

It should be made very clear in the beginning that the decree of the County Court of Logan County, Illinois, ordering the sale is valid and binding on all the world. This alone (as will be shown subsequently) **distinguishes this case from all cases cited by petitioner on the question of jurisdiction.**

The only person having any actual interest in the farm was Mark Barrett Cosby, Sr. This was decided in *Johnston* v. *Cosby*, 374 Ill. 407, which was a lawsuit to construe the will of May Barrett Chappelear to which the present petitioner was a party. It is absolutely immaterial that any persons including May Barrett Chappelear *thought* that others had interests in this land.

The petition to sell real estate to pay debts stated correctly that Mark Barrett Cosby, Sr. was the sole heir at law of the decedent May Barrett Chappelear.

The Illinois Statute.

The Illinois Statute makes complete and specific provisions for a proceeding to sell real estate to pay debts. Ill. Stat. (1937) Chapter 3, Paragraphs 100 to 111 inclusive and Paragraph 132. (See Appendix *Post*, pp. 29-31.)

The County Court is given plenary power to determine that land shall be sold and to settle all questions of title (Par. 102) and even to compel the filing of a petition to sell (Par. 132).

The heir must be made a party to the petition, but not the spouse of an heir (Par. 100).

On hearing the County Court may decree the sale of so much land as the Court considers it necessary to sell (Par. 108).

After the summons provided in Paragraph 103 no further notice is required by the Statute.

All sales are required to be made by the executor and such sale *bars heirs of the decedent and all persons* claiming by, through, or under them (Par. 109).

Full public notice is required for the sale, but no notice to the heir is required (Par. 110).

The sale must be reported to the Court within 10 days. The Statute does not require notice to the heir of the sale at the time of filing the report of sale (Par. 110).

Any person interested may object to confirmation of the sale within fifteen days of the sale (Par. 110). The heir has only the same privilege of objection, as others interested, the same privilege that creditors have. As an heir he is completely divested of title by the decree of sale.

There is no authority to extend the time for filing objections beyond fifteen days from the sale.

The Court on hearing the report, "May approve and confirm the sale, or disapprove the same and order the premises resold" (Par. 110). The proceeds of sale are money assets of the estate the same as proceeds of sale of personal property (Par. 111).

The Status of the Proceedings on July 21, 1938 when the Heir, Mark Barrett Cosby, Sr., Died.

In this case there was only one necessary party defendant, Mark Barrett Cosby, Sr. *Johnston* v. *Cosby*, 374 Ill. 407, held he was the sole heir. He was of sound mind (Finding 20, Pr. Rec. 418). He had entered his full appearance (Pr. Rec. 269-70).

The decree for sale was entered June 6, 1938. The sale was held July 2, 1938. The report of sale was made July 6, 1938. The objections were filed by Mark Barrett Cosby, Sr., on July 16, 1938. The time for objection by anyone expired fifteen days after the sale, July 17, 1938. On July 18, 1938, the report came on for hearing and the objections of Cosby were set for August 2, 1938.

This case is unlike the cases cited by petitioner for four reasons: *First*, all necessary parties were alive and before the Court; *Second*, every step had been taken in accordance with the decree of sale; *Third*, the decree of sale was in full force and effect, and *Fourth*, the time for every objection had passed and there remained only the action of the Court to approve or to disapprove.

By the decree of June 6, 1938, Mark Barrett Cosby, Sr., was divested of title to the land to be sold. The transaction of sale was thence forward between the Court as vendor and the purchaser sought or secured. The Court offers the land for sale and deals with the purchaser.

At this stage Mark Barrett Cosby, Sr., had no right in this land that was inheritable. He with creditors had a mere privilege of objection, the statutory privilege to make representations to the Court and to complain of a clear abuse of discretion by the court. The sale was

completely subject to that discretionary power of the Court.

Fifteen days after the sale having expired no one had a further statutory right to file objections.

On July 18, 1938 when the report came on for hearing Mark Barrett Cosby, Sr., was living and the *County Court had jurisdiction to confirm.* The Court set the report for future hearing. The case was ready for decision. The Court was endowed with the largest discretionary power to act to the interests of the Chappelear estate, its creditors, the lienholder, and the rights of the purchaser.

On August 2, 1938, the Logan County Court had the duty to pass promptly on the sale to David H. Harts. No other party than the court and David H. Harts was necessary. The discretion to be exercised in passing on the sale was the discretion of the court and no other. To attack on appeal, the decision reached by the exercise of that discretion, it would be necessary to establish positively that a substantially better result would be obtained by rejecting the sale and that the Court abused its discretion in approving the original sale.

The contention that between July 21, 1938 after all time for filing of objections had passed and August 2, 1938 the hearing on the report, either plaintiff in this case became a necessary party to sale proceedings for purpose of paying debts of May Barrett Chappelear is without merit.

In pointing out how clearly the Court is the real vendor under the Illinois Statute, the Supreme Court of Illinois in *Ehrgott* v. *Seaborn,* 363 Ill. 292 on 295 (1936) said:

> "The proceedings governing the sale of real estate to pay debts is a purely statutory one. The statute fixes the terms on which the real estate may be sold,

requires the executor or administrator making the sale to file in the office of the clerk of the Court, a complete report of the sale and a general statement of the manner in which the terms of the decree of sale were executed and provides that 'any person interested in the premises sold, and any creditor of the estate may * * * file exceptions to such report, and upon the hearing thereof the court may approve such report and confirm the sale, or disapprove the same and order the premises to be resold'. Ill. State Bar Stat., 1935, Chap. 3, par. 110, p. 61.

"It is obvious from this statutory provision that it was the legislative intent to confer upon the court ordering the sale a very broad power in the supervision of sales made under its order, and as an incident thereto, to approve or disapprove the report of sale as in its judicial discretion it shall deem proper. In harmony with this view it has been established that even though the premises may be declared struck off to the highest bidder, he thereby acquires no interest to or in the property, but his bid, in legal contemplation is a mere offer to buy. (*Farmers and Mechanics Bank* v. *Griffith*, 352 Ill. 323; *Anderson* v. *Anderson*, 338 id. 309) unless the Court confirms the report of sale there is no sale and neither the administrator nor the executor is bound. (*Anderson* v. *Anderson*, *supra*.) *From an application of these principles the rule emerges that the Court is the real vendor* and the executor or administrator is merely its agent for the purpose of procuring offers of sale which the court, acting within its judicial discretion may accept or reject. (*Farmers and Mechanics Bank* v. *Griffith*, *supra*; *Anderson* v. *Anderson*, *supra*.) From the fact that the Court is the vendor the principle may further be evolved that sales of this character by virtue of the Statute, are under the absolute control of the Court ordering the sale and such Court may approve or *of its own motion*, disapprove, any sale as in the exercise of its sound judicial discretion it may deem for the best interest of the parties concerned in the sale."

What was before the Court on August 2, 1938? Delay in confirmation was chargeable to Mark Barrett Cosby, Sr.'s objections to the sale. The only thing before the Court was the question whether the Court's administrative agent had carried out the decree of the Court in accordance with the terms thereof.

(1) Was the sale held as ordered?

(2) Was the sale fairly held?

(3) Was the price bid fair?

The County Court having found affirmatively on these matters found the objections of Mark Barrett Cosby, Sr., were not well taken.

Mark Barrett Cosby, Sr., did not offer to guarantee an equal or better price if a re-sale were ordered.

It was therefore obvious that Mark Barrett Cosby, Sr., would not produce matter to vary the discretionary conclusion of the court and the court had the *power* to confirm the sale.

No case cited by the appellants concerns a proceeding such as this one where *everything* had been *done, and done in accordance with the decree of sale*, and the time for *further objection had expired*, and the only question remaining was the proper administration of the decree, at the time of the death of the heir, Mark Barrett Cosby, Sr.

We have found no authority that such a decree could even be successfully attacked upon direct attack and we do not believe there is any such authority.

The position of the plaintiffs is worth reviewing at this stage in order to demonstrate its complete hollowness.

1. Mark Barrett Cosby, Sr., was the only person who could object to the sale prior to the expiration of time for filing objections.

2. Petitioner had no right to object during all the time allowed for objections because the sole owner (heir) was alive.

3. Mark Barrett Cosby, Sr., could only object upon the grounds that the sale was not in accordance with the decree or the price was not fair, or the sale was not fairly held.

4. Nevertheless the petitioner, who could not have objected at all had he appeared, contends that he can now in a collateral attack object *without any showing that the* sale *was unfair, in fact in spite of overwhelming evidence that it was fair.*

The County Court in Illinois Has Probate Jurisdiction and Jurisdiction of Sales of Real Estate to Pay Debts and Is Entitled to the Same Presumptions in Favor of Its Proceedings as a Court of General Jurisdiction.

The Seventh Circuit Court of Appeals has held in *Montgomery* v. *Equitable Life Assurance Society* (7th CCA, 1936) 83 Fed. 2nd 758, on 760-1 that the County Court of Logan County, Illinois is a court having jurisdiction of sales of real estate to pay debts and in that field is entitled to the same presumptions in favor of its proceedings as are indulged in favor of proceedings of courts of general jurisdiction. The Circuit Court of Appeals said on p. 761:

> "Jurisdiction of the subject matter is the power to decide the general question involved. It is not the exercise of that power. * * * It is the power to decide regardless of whether that decision be right or wrong."

The Court of Appeals further said on page 762:

> "The fact that a Court of general jurisdiction renders a decree, raises a presumption as against col-

lateral attack that it had jurisdiction both as to subject matter and the parties even though the decree contains no recital of notice to the defendants by service of process or otherwise. *Horn* v. *Metzger,* 234 Ill. 240, 84 N. E. 893. See also *Bradley* v. *Drone,* 187 Ill. 175, 58 N. E. 304, 79 Am. State Rep. 214."

Jurisdiction Once Having Attached Could Not Be Lost by Subsequent Irregularity.

This principle is clearly stated in:

Simmons v. *Saul,* 138 U. S. 439 (1890) 34 L. Ed. 1054;

Comstock v. *Crawford,* 3 Wall. 396, 404 (1866) 18 L. Ed. 34;

Kretzinger v. *Brown* (CCA 8th 1908) 165 Fed. 612, 616.

The principle is in fact far stronger than it need be pushed in this case. See *Montgomery* v. *Gilbert* (CCA 9th, 1935) 77 Fed. 2nd 39 and *Kretzinger* v. *Brown* (CCA 8th, 1908) 165 Fed. 612, 615. In the latter case the question as to the effect of failure to give the *prescribed* notice of sale arose. In upholding decrees where notice was not properly given, the Court said p. 616:

"They were passed in the exercise of a jurisdiction which attached when the petition was filed and the necessary parties defendant voluntarily appeared, and *that jurisdiction was not lost or impaired by the failure to give notice of the sale, because it was a mere irregularity in the subsequent proceedings. Simmons* v. *Saul,* 138 U. S. 439, 453, 11 Sup. Ct. 369, 34 L. Ed. 1054; *Grignon's Lessee* v. *Astor,* 2 How. 319, 340, *et seq.,* 11 L. Ed. 283; *Cooper* v. *Reynolds,* 10 Wall. 308, 319, 19 L. Ed. 931; *Mohr* v. *Manierre,* 101 U. S. 417, 25 L. Ed. 1052; *Jackson* v. *MacGruder,* 51 Mo. 55, 58; *Hanks* v. *Neal,* 44 Miss. 212, 226;

Schaale v. *Wasey*, 70 Mich. 414, 420, 38 N. W. 317; *Beidler* v. *Friedell*, 44 Ark. 411, 414; *Cadwaller* v. *Evans*, 1 Disn. (Ohio) 585, 592; *Wyant* v. *Tuthill*, 17 Neb. 495, 23 N. W. 342; *Salisbury* v. *Chadbourne*, 45 Wis. 71, 77. As was said in *Comstock* v. *Crawford*, 3 Wall. 396, 401, 18 L. Ed. 34:

"'When by the presentation of a case within the statute the jurisdiction of a Court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the Court can be collaterally assailed.'"

In the case before us there is no question that jurisdiction attached as to all necessary parties, which in this case was Mark Barrett Cosby, Sr., alone as a defendant and that such jurisdiction remained during execution of the decree on the merits (that a sale should be had) and remained until after all time for objections had expired. The only question that could remain would be whether the Court lost jurisdiction, *not to order sale*, but to *confirm* the sale made in accordance with its decree.

The Illinois Law Is Settled That Death Even Before Judgment on the Merits Does Not Deprive the Court of Jurisdiction and This Principle Is in Accordance With Due Process.

The law of the State of Illinois on the effect of death of a party after suit and before judgment is well summarized by Lindley D. J. in *Streeter* v. *Chicago Title and Trust Co.*, 14 Fed. 2nd 331 on p. 331:

"But the great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject matter and the person during the lifetime of a party, a judgment rendered for or against him after his death, although erroneous and liable to be set aside is not void or open to collateral

attack. See Freeman on Judgments, (5th Ed. 1925) Vol. 1, Sec. 406; 33 C. J. 1107; Black on Judgments, Vol. 1, Sec. 200. The rule in Illinois is settled in the case of *Claflin* v. *Dunne,* 129 Ill. 241, 21 N. E. 834, 16 Am. State Rep. 263. There, after the death of one of the defendants, judgment was entered. After expiration of the term the executor of the deceased defendant moved to vacate the judgment. The Court held the judgment voidable but not void saying:

"'The action was commenced while Claflin was alive. He appeared in Court and pleaded to the action. The Court thus had jurisdiction of the subject matter and of the person, and the question arises, whether, after the filing of the plea, the death of Claflin without notice of the death being brought to the attention of the Court, deprived the Court of jurisdiction to render a judgment in the cause. The question is not one free from difficulty, and one, too, upon which the authorities are not harmonious. Freeman on Judgments Sec. 140 says: "If jurisdiction be obtained over the defendant in his lifetime, a judgment rendered against him subsequent to his death is not void."'"

"See to the same effect, cases of *Stoetzell* v. *Fullerton,* 44 Ill. 108; *Danforth* v. *Danforth,* 111 Ill. 236; *Bushnell* v. *Cooper,* 212 Ill. App. 503; *Schaeffer* v. *Potzel,* 238 Ill. App. 335; *Larimer* v. *Snell,* 181 Ill. App. 50; *Gage* v. *Chicago Title & Trust Co.,* 303 Ill. 569, 136 N. E. 483."

"It would seem, therefore, *that there is no question concerning the law in Illinois.* Though the judgment against Streeter, dismissing his suit, was perhaps erroneous, yet it is not void, but merely voidable and remains in force and effect until reversed in proper proceedings. *This being* the rule under the Illinois authorities it must control this Court under the Conformity Act (17 Stat. 196)." (Italics ours.)

It should be pointed out that the Illinois authorities likewise control in the instant case, for the property in question is located in Logan County, Illinois and the proceedings to sell were held in the County Court of Logan County, Illinois.

This same principle is followed in other jurisdictions. See *Yople* v. *Titus,* 41 Pa. St. 195, 80 Am. Sec. 604; *Knott* v. *Taylor,* 99 N. C. 511, 6 S. E. 788; *McCormick* v. *Paddock,* 20 Neb. 486, 30 N. W. 602; *Shea* v. *Shea,* 154 Mo. 599, 55 S. W. 869; *Pugh* v. *McCue,* 86 Va. 475, 10 S. E. 715; *McCampbell* v. *Warrich Corporation,* 109 Fed. 2nd 115, 118 (CCA 7th).

A case exactly in point is *Palmerton* v. *Hoop* (Indiana 1892), 131 Ind. 23, 30 N. E. 874, where the court held that minor heirs could not collaterally attack a judgment confirming a sale where the court had jurisdiction of the administrator at the time of his death. The Court said, 30 N. E. 876:

> "It remains to inquire whether the failure to make the other appellants who are the minor children of Francis M. Palmerton, parties to the proceeding after his death, and before confirmation of the sale, renders the sale as to them void. There is no question made as to the fact that the Court had jurisdiction of Francis M. Palmerton, their father, at the time of his death. *When the land descended to them they took it, therefore, subject to the order previously made by the court to sell it. All that remained to be done was to sell the land, report the sale to the Court, procure its confirmation and execute a deed to the purchaser.* The fact that Francis M. Palmerton died did not deprive the Court of jurisdiction to render a judgment of confirmation. Black, Judgment Sec. 200 says, 'The great preponderance of authority is to the effect that where the court has acquired jurisdiction of the subject matter and the persons, during

> the lifetime of a party, a judgment rendered against him after his death, is although erroneous and liable to be set aside not void nor open to collateral attack.'" (Italics ours.)

The general authorities and texts bear out the rule. *Restatement of the Law of Judgments,* Sec. 78(b), p. 350; 1 *Black on Judgments* (2nd ed.), 294 Sec. 200; 1 *Freeman on Judgments* (5th ed.) 885, Sec. 406.

A Judgment Nunc Pro Tunc Would Have Been Proper.

There is an additional principle of law that where a case is ripe for decision a judgment may be entered *nunc pro tunc.* The entry of such a judgment in this case would *not have been an irregularity.*

In *Bunker* v. *Green,* 48 Ill. 243 (1868) where the plaintiff died before the defendant's motion for new trial was disposed of, the Court said:

> "In the 2nd Volume Tidd's Practice 846, 1st Am. Ed., it is said: 'And if either party die after a special verdict, and pending the time taken for argument or advising thereon, or on motion in arrest of judgment, or for a new trial, judgment may be entered, at common law, after his death, as of the term in which the postea was returnable, or the judgment would otherwise have been given *nunc pro tunc,* that the delay arising from the act of the court may not turn to the prejudice of the party.' This seems to be the long and well settled rule of practice under the common law, and it is not unreasonable or unjust in its application. A party should not be deprived of his rights because the tribunals of justice delay in its administration."

The same principle is clearly announced in *Citizens Securities & Investment Co.* v. *Dennis,* 236 Ill. App. 307, 309, 310, where the Court said:

"In Illinois, as we interpret the authorities the rule is that where one of the parties dies after the appeal has been taken, a judgment *nunc pro tunc* may be entered as of a date prior to the death of the party provided the Court had acquired jurisdiction and rightful authority to render a judgment on that date. *Danforth* v. *Danforth,* 111 Ill. 236, 237; *Seymour* v. *Richardson Fueling Co.,* 205 Ill. 77, 86; *Leonard* v. *Springer,* 174 Ill. App. 516, 523."

Here the case was ripe for decision when it came on for hearing after time for objections expired on July 18, 1938, while Mark Barrett Cosby, Sr., was still alive.

Had the plaintiffs either in 1938 or in 1945 prior to November of that latter year attacked the proceedings in the Logan County Court it could and and should have entered a new judgment *nunc pro tunc* confirming the sale. (See *In re Harvey, guardian of the heirs of Sweet,* 16 Ill. 127, where a sale was confirmed 17 years later).

Even divorce decrees where the matter is ripe for decision are entered *nunc pro tunc.* See 104 A. L. R. Annotation, page 654.

This matter was ripe for decision on July 18, 1938, and the factual situation was such that it would have been an abuse of discretion for the Logan County Court to refuse to confirm the sale.

In *Harvey, guardian of the heirs of Sweet,* 16 Ill. 127, the sale was confirmed 17 years later.

See also: *Mitchell* v. *Overman* (1881), 103 U. S. 62, 26 L. Ed. 369, 370; *Linn* v. *Brecher,* 90 Ill. App. 6, 8; 1 *Black on Judgments* (2nd Ed.) pp. 188-189, Sec. 128; 1 *Freeman on Judgments* (5th Ed.) pp. 226-7, Sec. 123.

How meaningless would be the presumptions in favor of a court having plenary jurisdiction of the subject mat-

ter as shown of this very County Court of Logan County, Illinois (*Montgomery* v. *Equitable Life Assurance Society* (CCA 7th, 1936) 83 Fed. 2nd 758, if we were not to assume the same considerations as to fairness of the sale moved the County Court of Logan County then as moved the District Court in this case (Findings 11 and 16, Pr. Rec. 416 and 417).

How dangerous to contend that established principles of jurisdiction so universally applied, as the foregoing authorities show, are not due process?

The petitioner was afforded an opportunity to be heard by the law of Illinois and was given an actual hearing on original bill. It has been conclusively determined that the sale was fair and, consequently, that he suffered no injury.

Constitutional argument is unavailing where there is no injury. See Re 620 *Church Street Building Corp.*, 299 U. S. 24 on p. 27 headnote 3, (1936) 81 L. Ed. 16 on 19; *Anderson National Bank* v. *Luckett,* 321 U. S. 233 on 242, headnote 7, 1943, 88 L. Ed. 692 on 702, and cases cited.

Petitioner Rights Derivative.

If the petitioner had any rights, they were purely derivative from the one person who had a right to be made a party, and this the District Court (Conclusions 2, 3, 4, 5 Pr. Rec. 418, 419) and the Circuit Court of Appeals (Pr. Rec. 2nd par. last sentence) clearly held.

Point B.

Petitioner declined to avail himself of the opportunity offered by the law of Illinois to reopen the proceedings in the County Court of Logan County, Illinois.

Denk v. *Fiel* (1911), 249 Ill. 424 on 430, points out that a minor in Illinois is given reasonable time after majority to make a direct attack on decrees which he claims have injured him.

This case also holds that this right cannot be exercised to the detriment of a purchaser in good faith relying on a decree.

The situation as to due process here may be briefly stated:

1. No individual can deprive another of property without due process of law. That deprivation must be by a law or by a Court. To be deprived one must have had a right.

2. Mark Barrett Cosby, Jr., had no right to be notified of the proceedings to sell to pay debts in the estate of May Barrett Chappelear wherein Mark Barrett Cosby, Sr., was the only heir.

3. *He had no right to a hearing on whether there should be a sale.*

4. The correctness of the decree of sale is unimpeached and unimpeachable.

5. Had Mark Barrett Cosby, Jr. come in to the County Court of Logan County at any time up to November of 1945 the Law of Illinois and the County Court of Logan County would have given him a full hearing.

6. It would have been a hearing on the *adequacy* and *fairness* of the sale *not* on the question *whether there should be* a sale. That question was determined before he had any rights in the matter.

7. Due process requirements are only that the state judicial machinery offer an "opportunity to be heard".

8. Here in fact Mark Barrett Cosby, Jr. was advised by the pleadings of defendants that he had a full right to reopen the decree of the County Court of Logan County for a year after he filed this suit. (Finding 10, Pr. Rec. p. 420.)

9. Plaintiff here *seeks* under the guise of "due process" *to question a decree he never at any time had a right to question,* the decree for sale.

Point C.

Petitioner has not been deprived of property or other right without due process because he is in exactly the same position as if the motion to dismiss the suit as a collateral attack had never been filed.

Due process was of course accorded by the County Court of Logan County, Illinois as shown in Point A hereof. It has been the settled law of Illinois for many years that a court having jurisdiction of parties could enter a valid judgment after the death of one of the parties. Authorities cited under Point A show this has been the rule approved in other jurisdictions and by the text writers for many years.

The Court has always given the settled procedure in such matters great weight on the question of due process.

> "Not lightly vacated is the verdict of Quiescent years." *Anderson National Bank* v. *Luckett,* 321 U.S. 233 on 244; Headnote 11 (1943), 88 L. Ed. 692 on 702, (and cases cited).

In Point B, we demonstrated that the law of Illinois afforded a method of asserting the rights of a minor who felt injured by decree after reaching majority.

However, here and now petitioner is asserting that he has been denied due process by the District Court of the United States and by the United States Circuit Court of Appeals. Notwithstanding the views of those courts that petitioner sought the wrong remedy, *the defendants' jurisdictional motion was for practical purposes overruled by the District Court.*

Petitioner was in fact given every right which an original bill of equity could give him. The District Court gave him a trial on the merits and found affirmatively and conclusively that he had no basis for complaint.

Since the findings of fact of the District Court are conclusive where there is any evidence to support them respondent does not here review the evidence. (Rule 52, Federal Rules of Civil Procedure as amended by the Supreme Court of the United States, Dec. 27, 1946; *Gaytime Frock Co.* v. *Liberty Mutual Ins. Co.* (7th C.C.A. 1945), 148 Fed. 2nd 696; *Knapp* v. *United States* (7th C.C.A. 1940), 110 Fed. 2nd 420 on 422; *McIntosh* v. *Wiggins* (8th C.C.A. 1941), 1923 Fed. 2nd 316 on 321.)

However to say that the District Court merely found the sale fair, based on an adequate price and not tainted with fraud is a great understatement. *The Court found affirmatively that the purchase was made in good faith.* (Finding 16, Pr. Rec. 417.)

The decree of sale was unassailable, the Court was the vendor, (*Erghott* v. *Seaborn* (1936), 363 Ill. 292, previously quoted at length in this brief) and all that remained for anyone was a right to be heard on whether the sale conformed to the decree and was fair.

However, the District Court of the United States went behind all of these matters and determined positively that

the proceedings were necessary, were regular and produced a good result for the estate. The District Court found affirmatively that there was no fraud and that the defendants purchased in good faith.

Petitioner has therefore had a complete determination by a court of law that there is nothing to his case and that he has been harmed in no way.

It is a hollow contention to claim deprivation of due process because the District Court which heard petitioner's case also told him it would not have had to hear it.

D.

Petitioner's authorities distinguished.

Respondent has read and analyzed all cases cited by petitioner. Respondent believes many of the cases are far afield and that there is not space for complete analysis.

Respondent's summary analysis of those cases is as follows:

A. Cases where there was a failure to include a party who was an actual owner at the *commencement* of the proceedings:

Botsford v. *O'Connor*, 57 Ill. 72 (1870);
Alward v. *Borah*, 381 Ill. 134 (1942);
Heppe v. *Szczepanski*, 209 Ill. 88 (1904);
Leininger v. *Reichle*, 317 Ill. 625 (1925);
Burr v. *Bloemer*, 174 Ill. 638 (1898);
Hedlund v. *Miner*, 395 Ill. 217 (1946);
Phillips v. *Parker*, 148 Kans. 474 (1938);
Elliott v. *Frakes*, 71 Ind. 412 (1880);
Hansen v. *Swartz*, 345 Ill. 609 (1931);

Sutton v. *Read*, 176 Ill. 69 (1898);
Baker v. *Baker*, 284 Ill. 537 (1918);
Walker v. *Cook*, 294 Ill. 294 (1920);
Wright v. *Simpson*, 200 Ill. 56 (1902);
Fischer v. *Banta*, 66 N. Y. 468 (1876);
Swope v. *Swope*, 173 Ala. 157.

B. Cases where a necessary party died prior to presentation of the merits and decree or judgment thereon *e. g.*, death before decree for specific performance or foreclosure:

Welch v. *Louis*, 31 Ill. 446 (1863);
Requa v. *Holmes*, 16 N. Y. 193 (1857);
Hoffman v. *Hanley*, 187 Ill. App. 551 (1914);
Rives v. *Stanford*, 188 Okla. 108 (1940);
Zaegel v. *Kuster*, 51 Wis. 31 (1881);
Sargeant v. *Rowsey*, 89 Mo. 617 (1886);
Kager v. *Vickery*, 61 Kans. 342 (1900);
Hunt v. *Acre*, 28 Ala. 580 (1856).

C. Cases of direct attack upon the decree plus some showing of inadequacy of price or failure to conform to decree of sale or improper advertisement or the like.

Bondurant v. *Bondurant*, 251 Ill. 324 (1911);
Loyd v. *Malone*, 23 Ill. 41 (1859);
Retzinger v. *Retzinger*, 337 Ill. 378 (1929);
Quigley v. *Breckenridge*, 180 Ill. 627 (1899).

D. Cases where there was obviously no privity between parties bound and parties asserting rights such as class suits where the class was not representative, suits where former owner had already parted with title when suit was brought, and the like:

Newberry Library v. *Bd. of Education*, 387 Ill. 85 (1944);

Postal Telegraph Cable Co. v. *Newport*, 247 U.S. 464, 62 L. Ed. 1215 (1918);

Harris v. *Chicago Title and Trust Co.*, 338 Ill. 245 (1940);

Hansberry v. *Lee*, 311 U.S. 32, 85 L. Ed. 22 (1940);

U. S. v. *Walker*, 109 U. S. 258 (1883);

Brown v. *Fletcher's Estate*, 210 U. S. 82 (1908);

People v. *Chicago Lloyds*, 391 Ill. 492 (1945);

Evans v. *Ill. Surety Co.*, 319 Ill. 105 (1925);

Weberpals v. *Jenny*, 300 Ill. 145 (1921).

E. Where jurisdiction was obtained by fraud or collusion or other circumstances making judgment unconscionable:

Indiana Harbor B. R. R. Co. v. *Calumet City*, 391 Ill. 280 (1945);

Eddy v. *Eddy*, 302 Ill. 446 (1922);

Manternach v. *Studt*, 230 Ill. 356 (1907);

Heppe v. *Szczepanski*, 209 Ill. 88 (1904);

Arrowsmith v. *Gleason*, 129 U. S. 86, 32 L. Ed. 630 (1889);

McReynolds v. *Miller*, 372 Ill. 151 (1939);

Denk v. *Fiel*, 249 Ill. 424 (1911);

Pfister v. *Johnson*, 13 Fed. Supp. 662 (N. D. Okla. 1936);

Hewitt v. *Hewitt*, 17 F. (2nd 716 (C.C.A. 9th 1927));

Diamond v. *Connolly*, 251 Fed. 234 (C.C.A. 9th 1918);

Barrow v. *Hunton*, 99 U. S. 80, 25 L. Ed. 407 (1879);

Johnson v. *Waters*, 111 U. S. 640, 28 L. Ed. 547 (1884);

Marshall v. *Holmes*, 141 U. W. 589, 35 L. Ed. 870 (1891);

McDaniel v. *Traylor*, 196 U. S. 415, 49 L. Ed. 533;

Simon v. *Southern Ry.*, 236 U. S. 115, 59 L. Ed. 492;

National Surety Co. of N. Y. v. *State Bank*, 120 Fed. 593;

Nelson v. *Meehan*, 155 Fed. 1;

U. S. v. *Mashunkashey*, 72 Fed. 2nd 847;

C. R. I. & P. R. R. Co. v. *Callicote*, 267 Fed. 799;

Grover v. *Faurot*, 76 Fed. 257.

F. Cases giving details of hearing accorded on question of adequacy of hearing actually provided such as *Windsor* v. *McVeigh*, 93 U. S. 274 (1876) where party was refused right to be heard on the ground that he was a confederate rebel.

Londoner v. *Denver*, 210 U. S. 373 (1908);

Burkett v. *Reliance Bank and Trust Co.*, 367 Ill. 196;

B. & O. R. R. v. *U. S.*, 298 U.S. 349 (1936).

G. *Miscellaneous: LeMoyne* v. *Harding*, 132 Ill. 23 (1890), where sale was ineffective because bidder did not complete purchase within 30 days ordered by the Court; *Anderson* v. *Shepard*, 285 Ill. 544 (1918) concerning unconstitutionality of law requiring administrator to register title; *Armstrong* v. *Obucino*, 300 Ill. 140 (1921) holding proceeding under a repealed mechanic's lien statute a void proceeding; *Baker* v. *Baker*, 284 Ill. 537 (1918), contingent interests should be represented in

partition suit. *Essanay Film Mfg. Co.* v. *Wm. R. Kane,* 258 U. S. 358, 66 L. Ed. 658 that jurisdiction of State Court cannot be questioned in federal court while state suit is pending; *MacArthur* v. *Scott,* 113 U. S. 340, 28 L. Ed. 1015, on general proposition that all necessary parties should be before the court in an equity suit; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. Ed. 819 on reasonableness of utility regulation; *Simon* v. *Craft,* 182 U. S. 427, 45 L. Ed. 1165 (1891) that lunacy trial in absence of defendant may be proper, *Wells Fargo* v. *Taylor,* 254 U. S. 175, 65 L. Ed. 205 (1920) that suit contrary to agreement may be against equity and good conscience; *Hultberg* v. *Anderson,* 252 Ill. 607 on 616 (1912), which firmly holds that to void erroneous judgments would destroy our judicial system; *People* v. *Feicke,* 252 Ill. 414 that service on representative in fiduciary capacity will not bind adverse existing beneficial interest; *People* v. *Russell,* 283 Ill. 520, that a judgment is binding until set aside; *Rabbitt* v. *Weber & Co.,* 297 Ill. 491 that an attachment proceeding is void where affidavit fails to set up the necessary jurisdictional facts.

In *Hopkins* v. *Curtis,* 43 R. I. 19 (1920), also cited by petitioners the court held the decree after death proper as to those parties whose interests had been represented at the hearing on the merits. In *Quigley* v. *Breckenridge,* 180 Ill. 627 (1899), also cited by Petitioners the Supreme Court of Illinois reinstated a sale which had been set aside by the Circuit Court. In *Gibson* v. *Roll,* 27 Ill. 88 (1862) the Supreme Court of Illinois makes it very clear that the method of bringing in parties in a petition of this kind is statutory.

We have reviewed Petitioners' cited cases at length to show that no case is cited where jurisdiction attached to the proper parties in the beginning and the matter

proceeded beyond a hearing on the merits as the record shows was done in the instant case.

Here we reiterate the decree for sale being valid, the only question that could remain for any court at any time would be the conformity of that sale to the decree and its essential fairness, and the District Court found from the evidence that the sale conformed to the decree and was completely fair.

CONCLUSION.

Denial of due process is not fairly involved here.

The County Court of Logan County, Illinois, entered an administrative order approving the sale here involved.

The law of Illinois gave petitioner here a full right to attack that order in that Court. Petitioner declined to avail himself of it.

The District Court of the United States heard petitioner upon all charges made by him, as if it were hearing objections to the sale. It found conclusively that every charge made by petitioner was untrue; that the sale was fairly held, that the land was sold for its fair value, that the purchaser bought in complete good faith in the decree of the Court, bidding against the world.

Upon these findings the court must hold that the sale made should be confirmed, except that it held it had not jurisdiction to review the order of the State Court.

On this state of the case, the contention that the decree of the District Court, and the judgment of the Seventh Circuit Court of Appeals deprived him of due process, the opportunity to be heard, is without basis in reason.

It is plain that he had both opportunity and hearing, and plain that he has suffered no injury.

It is of no small importance that decrees of State Courts following regularly established process resulting in fair sales necessarily made should be decrees that purchasers in good faith can rely upon and that such purchasers should not be deprived of their property arbitrarily or without due process.

Respondents respectfully submit that petitioner has had his day in Court. The petition for further review should be denied.

Respectfully submitted,

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APPENDIX.

The following sections of the Illinois Administration Act are taken from Illinois Revised Statutes State Bar Association Edition 1937, Chapter 3, paragraphs 100 to 111, inclusive, and paragraph 132.

100. Petition—Parties). § 99. The mode of commencing the proceedings for the sale of real estate in such cases shall be by the filing of a petition by the executor or administrator in the circuit or county court of the county where letters testamentary or of administration were issued. The widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservator of such as have conservators, and all persons holding liens against the real estate described in the petition, or any part thereof, or having or claiming any interest therein in possession or otherwise shall be made parties. If there are persons interested in the premises whose names are not known, then they shall be made parties by the name of unknown owners.

101. Form of petition). § 100. The petition shall set forth the facts and circumstances on which the petition is founded, in which shall be stated the amount of claims to be presented, and it shall also contain a statement of the amount of personal estate which has come to the hands of the petitioner, and the manner in which he has disposed of the same, with a statement of the amount of claims paid, a particular description of the real estate sought to be sold, and the nature and extent of all liens

upon said real estate so far as the same may be known to the petitioner. The petition shall be signed by the executor or administrator and verified by his affidavit.

102. Practice). § 101. Such application shall be docketed as other causes, and the petition may be amended, heard or continued for notice or other cause, and the practice in such cases shall be the same as in civil cases. The court may direct the sale of such real estate, disincumbered of all mortgage, judgment or other money liens that are due, and may provide for the satisfaction of all such liens out of the proceeds of the sale, and may also settle and adjust all equities and all questions of priority, between all parties interested therein, and may also investigate and determine all questions of conflicting or controverted titles arising between any of the parties to such proceeding, and may remove clouds from the title to any real estate sought to be sold and invest purchasers with a good and indefeasible title to the premises sold. The court may, with the assent of any mortgagee of the whole or any part of such real estate, whose debt is not due, sell such real estate disincumbered of such mortgage, and provide for the payment of such mortgage out of the proceeds of such sale; and may also, with the assent of the person entitled to an estate in dower, or by the curtesy, or for life or for years, or of homestead to the whole or in part of the premises, who is a party to the suit, sell such real estate with the rest. But such assent shall be in writing and signed by such person and filed in the court wherein the said proceedings are pending. When any such estate is sold, the value thereof shall be ascertained and paid over in gross, or the proper proportion of the funds invested, and the income paid over to the party entitled thereto during the continuance of the estate.

103. Summons.) § 102. Upon the filing of the petition, summons shall be issued, served and returned as in other civil cases.

104. Civil practice act to apply.) § 103. The provisions of the Civil Practice Act, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise.

105. Notice by publication and mail.) § 104. Whenever any petitioner or his attorney shall file, in the office of the clerk of the court in which his petition is pending, an affidavit showing that any defendant resides or hath gone out of this state, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that, upon diligent inquiry, his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper printed in his county, and if there is no newspaper published in his county, then in the nearest newspaper published in this state, containing notice of the filing of the petition, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case, and a description of the premises described in the petition; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he has sent such notice in pursuance of this section shall be evidence.

106. Further notice—Default.) § 105. The notice required in the preceding section may be given at any time after the filing of the petition, and shall be published once in each week for three successive weeks, and no default or proceeding shall be taken against any defendant not served with summons, and not appearing unless the first publication be at least thirty days prior to the day on which such default or proceeding is proposed to be taken.

107. Of persons under disability.) § 106. When it appears that any of the persons required to be made parties defendant, who have been served with summons or notified as aforesaid, are minors, under the age of twenty-one years if males, or eighteen years if females, without a guardian resident in this state, or are persons having conservators, or where such guardian, if any, or conservator, shall not be personally served with summons or shall not appear, the court shall appoint a guardian *ad litem*, who shall appear and defend in behalf of such minors, and be allowed such compensation as may be fixed by the court.

108. Hearing—Decree of sale—Overplus.) § 107. Upon hearing the cause upon the issues formed or taken, the court shall hear and examine the allegations and proofs of the parties and of all other persons interested in the estate who may appear and become parties; and if, upon due examination, the court shall find that the executor or administrator has made a just and true account of the condition of the estate, and that the personal estate of the decedent is not sufficient to pay the debts against such estate, the court shall ascertain, as nearly as can be, the amount of deficiency, and how much of the real estate described in the petition it is necessary to sell to pay such

deficiency, with the expenses of administration then due or to accrue, and make a decree for the sale thereof; Provided, that where any houses and lots, or other real estate, are so situated that a part thereof cannot be sold without manifest prejudice to the heirs, devisees or owner, the court may order the sale of the whole or such part as it may deem best, and the overplus arising from such sale shall be distributed among the heirs and devisees, owners, or such other persons as may be entitled thereto.

109. Conveyances.) § 108. All such sales of real estate shall be made and conveyances executed for the same, by the executor or administrator applying for such order, and shall be valid and effectual against the heirs and devisees of such decedent, and all other persons claiming by, through or under him or them. In case of the death of the executor or administrator applying for an order of sale before conveyance is made, the administrator *de bonis non* shall proceed in the premises and make conveyance in the same manner as if he had originally applied for such order—which conveyance shall be good and valid.

110. Sale—Time of—Notice—Terms—Return.) § 109. No lands or tenements shall be sold by virtue of any such order of the county court, unless such sale is at public vendue, and between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of the same day, nor unless the time, place and terms of holding such sale were previously published for the space of three weeks, by putting up a written or printed notice thereof at the door or a bulletin board of the court house and at four other public places in the county where such real estate shall be sold, and also by causing a similar notice thereof to be published once in each week for three successive weeks prior to the sale, in some newspaper published in such county; or, if there be no such news-

paper, then in such other newspaper in this state, as the court shall direct; nor unless such real estate shall be described with common certainty in such notices. Such executor or administrator may sell the same for not less than one-third cash, and take notes for the balance of the purchase price, payable in not less than six nor more than eighteen months, secured by a mortgage or trust deed, approved by the court, on the premises sold, to secure the payment of the purchase money. It shall be the duty of the executor or administrator making such sale within ten days thereafter, to file in the office of the clerk of said court a complete report of said sale, giving a description of the premises sold, to whom, where, and upon what terms sold, and a general statement of the manner in which the terms of the decree were executed. Any person interested in the premises sold, and any creditor of the estate may, within fifteen days after such sale file exceptions to such report, and upon the hearing thereof the court may approve such report and confirm the sale, or disapprove the same and order the premises to be re-sold.

111. Proceeds of sale.) § 110. When real estate is sold, the moneys arising from such sale shall be received by the executor or administrator applying for the order to sell, and shall be assets in his hands for the payment of debts, and shall be applied in the same manner as assets arising from the sale of personal property.

132. Sale to pay debts—Coerced.) § 130. Whenever real estate is required to be sold, for the payment of debts and costs and expenses of administration, or for the purpose of satisfying a legacy which is a charge upon such real estate, the court may make all necessary orders to coerce the executor or administrator to make immediate application for an order to sell such real estate.